Petition

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81-361

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

LOUIS BRAMKAMP, *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO on the relation of PEDRO BAREZ, SECRETARY, DEPARTMENT OF LABOR AND HUMAN RESOURCES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commonwealth of Puerto Rico has *parens patriae* standing to sue 30 New York apple growers for allegedly breaching the employment contracts of, at most, 611 Puerto Rican workers.

2. Whether the Commonwealth of Puerto Rico has *parens patriae* standing based upon alleged harm to its general economy where only a small number of Puerto Rican citizens could have been harmed by the New York apple growers' alleged breaches of employment contracts, the impact of the alleged breaches of employment contracts upon the general economy of Puerto was relatively slight, and the affected individual Puerto Ricans were in a position to vindicate their own rights and were actually litigating the same issues in other forms.

3. Whether the Commonwealth of Puerto Rico should be permitted to overburden the federal courts with a *parens patriae* lawsuit on behalf of a handful of Puerto Rican workers whose complaints were investigated by the U.S. Department of Labor's Employment Service Complaint System and found to be without substance.

4. Whether the Commonwealth of Puerto Rico has *parens patriae* standing to sue New York apple growers for alleged violations of federal statutes and regulations.

PARTIES TO THE PROCEEDING BELOW

The respondent before this Court, the Commonwealth of Puerto Rico on the relation of the Secretary of the Department of Labor and Human Resources, was the plaintiff before the United States District Court for the Southern District of New York and the appellant before the United States Court of Appeals for the Second Circuit.

The petitioners before this Court, who were defendants before the district court and appellees before the court of appeals, are the following apple growers located in the Hudson Valley of the State of New York:

Louis Bramkamp
Eugene R. Coy
Robert Coy
John Gaffney
Merritt Hart, d/b/a Hart Apple Corp.
Nick Caruso
Paul Minard
Ernest Greiner
Jerry Bloom & Son, Inc.
Jerry Bloom
Orchards of Concklin, Ltd.
Peter R. Concklin
Goold Orchards, Inc.
Sue Goold Miller
M.G. Hurd & Son, Inc.
Melvin Hurd
Minard Farm, Inc.
Yvonne Minard
Overlook Farms, Inc.
James Lyons
Altamont Farm, Inc.
Bill Paladino
Mike Lembo & Son
Michael Lembo, Jr.

Rocco Currie Enterprises, Inc.
Rocco J. Currie
Troncillito Bros.
Alan Troncillito
Hudson River Fruit Dist.
Harold Albinder
Yonder Farms, Inc.
Peter J. Chiaro
Dressel Farms
Ethel K. Dressel
Mountain Range Farm
Alfred Marchisio
Altamont Orchards
Joseph Abbruzzese
J. W. Clark & Sons
John W. Clark
Moriello Bros.
Anthony Moriello
Joseph Moriello
William A. Coy & Son
William A. Coy, Sr.
Cross Orchards & Storage Co.
Raymond Cross
Albert Angelo & Son
Albert Angelo, Jr.
Greiner Bros.
David Greiner
Harold Greiner
A. J. Dembroski
Alex Dembroski
Joseph Dembroski

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DECISIONS BELOW

On September 28, 1979, the United States District Court for the Southern District of New York issued its decision granting the petitioner apple growers' motion to dismiss on the ground that respondent Commonwealth of Puerto Rico lacked *parens patriae* standing. The district court's memorandum granting the motion to dismiss is not published, but it adopted the reasoning of an earlier opinion of Judge James C. Turk of the Western District of Virginia which is reported at 469 F. Supp.

928 (W.D. Va. 1979). Both the memorandum opinion and the opinion of Judge Turk appear at Appendices A and B hereof, respectively.

On July 28, 1981, the United States Court of Appeals for the Second Circuit reversed the district court. That opinion, which is not yet reported, appears at Appendix C hereof.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Second Circuit entered its judgment on July 28, 1981.

STATUTES INVOLVED

The statutes involved in this case are the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.*, and the Wagner-Peyser Act, 29 U.S.C. §§ 49-49k. The administrative regulations principally involved are the Temporary Foreign Labor Certification Process Regulations, 20 C.F.R. Part 655 (1978), and the Wagner-Peyser Act Regulations, 20 C.F.R. Parts 653 and 658 (1978). The pertinent provisions of these statutes and regulations are set forth in Appendix D hereof.

STATEMENT OF THE CASE

On January 12, 1979, the Commonwealth of Puerto Rico filed a complaint in the United States District Court for the Southern District of New York against 30 New York apple growers.[1] The Commonwealth sued in its capacity as *parens patriae* on behalf of 611 Puerto Rican workers who had allegedly accepted employment picking apples for the 30 New York growers during the 1978 apple harvest. The Commonwealth's complaint sought a declaratory judgment that each of the 30 New York

[1] The complaint also named 25 officers, partners, or employees of the 30 apple growers.

growers had breached the terms of his contracts with his Puerto Rican workers and had violated certain federal statutes and regulations. The Commonwealth also sought a permanent injunction against future violations by the 30 New York growers. On September 28, 1979, Judge Duffy of the Southern District of New York held that the Commonwealth lacked standing as *parens patriae* to prosecute the action since neither the segment of the Commonwealth's population nor the injury to the Puerto Rican economy was of sufficient magnitude to confer *parens patriae* standing and since the Puerto Rican workers allegedly injured stood ready and willing to vindicate their own rights and were in fact actually litigating the same issues in other forums. On July 28, 1981, the United States Court of Appeals for the Second Circuit reversed the District Court and held that the Commonwealth did have *parens patriae* standing.

This action arises out of the 1978 apple harvest in the State of New York. During the spring of that year, the petitioners, apple growers located in the Hudson Valley of New York State, applied to the U.S. Department of Labor for certification of their needs for temporary foreign labor, anticipating that, as in other years, they would not be able to recruit sufficient domestic labor to harvest their apple crops.[2]

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[2] The Immigration and Nationality Act, specifically 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c), provides for the admission into the United States of temporary foreign workers when enough qualified unemployed United States workers are not available. The Commissioner of Immigration and Naturalization has delegated to the U.S. Secretary of Labor the responsibility for determining whether enough qualified American workers are available to fill a particular job and whether the admission of temporary foreign workers will adversely affect United States workers. 8 C.F.R. § 214.2(h)(3) (1978). The U.S. Secretary of Labor has promulgated regulations prescribing the standards under which he will determine whether qualified United States workers are available. 20 C.F.R. Part 655 (1978). Neither the statute nor the regula-

Over the years, referral of Puerto Rican workers to East Coast apple growers such as the New York apple growers has been complicated by the existence of a law unique among the states participating in the Interstate Clearance System, namely Puerto Rican Public Law 87, 29 L.P.R.A. §§ 526 *et seq.*, as amended. P.L. 87 requires any mainland employer seeking to hire Puerto Rican workers to first enter into a contract with the Puerto Rican Secretary of Labor and Human Resources. Failure to do so subjects the grower to possible criminal and civil penalties. Because P.L. 87 imposes terms and conditions of employment more onerous and burdensome than those imposed by the Wagner-Peyser Act and the Immigration and Nationality Act, two courts have held that Puerto Rican workers could not be considered "available"

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tions assigns any role in administering this program to the Commonwealth of Puerto Rico. One requirement of the Temporary Foreign Labor Certification Regulations is that an employer desiring to bring in temporary foreign workers must first submit a job offer which is circulated through the Interstate Clearance System established pursuant to the Wagner-Peyser Act. 20 C.F.R. §§ 655.201(c) and 655.205 (1978).

The Interstate Clearance System is a national system of public employment offices administered through a bureau known as the United States Employment Service. 29 U.S.C. §§ 49 *et seq.* The purpose of the system is to provide a no-fee labor exchange, whereby employers located in sections of the country where there are too few workers can be brought together with qualified workers from other areas who are seeking employment. 20 C.F.R. § 653.108 (b)(1) (1978). The U.S. Secretary of Labor has promulgated rules and regulations to carry out the provisions of the Act, pursuant to the authority vested in him by the Act. 29 U.S.C. § 49k; 20 C.F.R. Part 653 (1978). Generally, an agricultural employer desiring to utilize the Interstate Clearance System must submit a job order which meets certain specified minimum requirements. 20 C.F.R. § 653.108(c)(7), (d)(3) (1978). The U.S. Secretary of Labor has also established a complaint system to handle employee complaints alleging an employer's failure to comply with Employment Service regulations. *See* 20 C.F.R. Part 658 (1978).

within the meaning of the Immigration and Nationality Act as long as the special conditions placed on their employment by P.L. 87 remained in effect. *See Flecha v. Quiros* 567 F.2d 1154 (1st Cir. 1977), *cert. denied*, 436 U.S. 945 (1978), and *Galan v. Dunlop*, 411 F. Supp. 268 (D.D.C. 1975), *appeals dismissed as moot and remanded with order to vacate sub. nom. Galan v. Usery*, Nos. 76-1018 and 76-1019 (D.C. Cir. 1977) (unpublished).

As a result of the First Circuit's decision in *Flecha v. Quiros, supra*, the U.S. Department of Labor took the position, when the 30 New York apple grower petitioners filed their 1978 job orders, that the job orders would not be circulated to Puerto Rico. After this Court denied certiorari in *Flecha v. Quiros* on June 5, 1978, 436 U.S. 945 (1978), the legislature of Puerto Rico approved an amendment to P.L. 87 in July, 1978 by which the Commonwealth Secretary of Labor and Human Resources was authorized to exempt prospective employers from P.L. 87 under certain conditions. The U.S. Department of Labor subsequently forwarded the New York apple growers' job orders to Puerto Rico on August 2, 1978, less than two weeks before the New York apple growers were supposed to be "certified" regarding their need for temporary foreign workers. The hasty, last minute recruitment efforts produced names of approximately 1,000 Puerto Rican workers interested in picking apples in the 1978 East Coast apple harvest.[3]

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[3] The New York apple growers together with other apple growers and apple grower associations filed suit in the United States District Court for the Western District of Virginia challenging the propriety of the exemption from P.L. 87 and of the referral of Puerto Rican workers. The district court granted the requested preliminary injunction. *Frederick County Fruit Growers Association, Inc., et al. v. F. Ray Marshall, et al.*, Civ. No. 78-0086(H) (W.D. Va., filed August 31, 1978), *appeals dismissed as moot and remanded*, 594 F.2d 857 (4th Cir. 1978) (unpublished). On June 16, 1980, the district court dismissed the case on the grounds of mootness. (Unpublished opinion.)

By all accounts, the experience of the Puerto Ricans who worked for the New York apple growers in 1978 was not satisfactory. Only 386 of the 611 Puerto Ricans referred to the New York growers actually arrived at the New York orchards,[4] and approximately 50 still had employment three weeks later. First Amended Complaint ¶ 68. The referral of such a large number of Puerto Rican workers to the New York apple growers, dwarfing the number of referrals both in prior and subsequent years, was made possible by a unique U.S. Department of Labor program that provided federal funding to finance the transportation expenses of Puerto Rican workers, an advantage provided to no other U.S. workers either that year or in previous years. The General Accounting Office subsequently examined the U.S. Department of Labor's expenditures of Comprehensive Employment and Training Act ("CETA") funds to transport Puerto Rican workers to the 1978 Virginia apple harvest. *See* Report by the Comptroller General of the United States to Senator Robert C. Byrd, "Recruiting and Placing Puerto Rican Workers with Growers During the 1978 Apple Harvest Were Unsuccessful," HRD-80-45 (GAO, February 14, 1980). The Comptroller General's report states that $275,000 in CETA funds were spent in 1978, although only one-third of the Puerto Rican workers met the eligibility requirements for benefits under the U.S. Department of Labor's regulations. *Id.* at 2, 4. Regarding the recruiting and referral of Puerto Rican workers, the report states that "the effort was

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[4] The remainder allegedly never left Puerto Rico "because of oral advice by the Office of the Solicitor, U.S. Department of Labor, to plaintiff Quiros that certain growers had refused to employ individuals recruited by the Puerto Rican Employment Service and referred from Puerto Rico." First Amended Complaint ¶ 70. The complaint does not identify the growers who the U.S. Department of Labor claimed had refused to employ Puerto Ricans.

poorly managed and resulted in few acceptable workers being referred to growers." *Id.* at 2. The report concludes that "Labor, State and other local employment security agency, and CETA title III grantee staff, as well as the growers we interviewed, attributed this situation to poor recruitment in Puerto Rico." *Id.* Appendix I, at 18.

Eventually, 120 of the 386 Puerto Rican workers who worked in the 1978 New York apple harvest filed complaints with the U.S. Employment Service Complaint System. *See* 20 C.F.R. Part 658. According to an affidavit of the Regional Monitor/Advocate of the Employment and Training Administration of the U.S. Department of Labor,

> Mr. Rio's complaint was one of approximately 120 complaints filed by Puerto Rican workers as a result of their experiences in the 1978 New York apple harvest . . . At the present time, all of the 120 complaints have been resolved at the State level of the administrative complaint system. *In all cases, New York State was unable to substantiate the complaints of those workers.* Upon the completion of the State's action, each of the 120 workers was advised of the administrative determination by New York and also advised of their right to appeal that determination to the Federal Regional Administration. Only ten workers took an appeal.

See Affidavit of Kenneth Hamlett of August 7, 1980, attached as Appendix B to the Memorandum in Response to Plaintiffs' Motion for a Preliminary Injunction Against the Federal Defendants, *Rios v. Marshall*, No. 79 Civ 5711 (S.D.N.Y., filed October 22, 1979). (Emphasis added.) In fact, the Commonwealth of Puerto Rico subsequently appealed one of the decisions of the New York State Job Service to the Regional Administrator's office on behalf of the complaining Puerto Rican worker. *See* letter of April 7, 1970, from Leandro L. Pena, Director of the Bureau of Employment Security of the Department

of Labor and Human Resources of the Commonwealth of Puerto Rico, to Regional Administrator James A. Ware, attached as Exhibit 3 to Affidavit of Kenneth Hamlett, *supra*, a copy of which appears at Appendix E hereof.

A number of Puerto Rican workers who worked for the New York apple growers in 1978 have filed lawsuits of their own against the growers. Some of the defendant New York growers have been sued in local Puerto Rican courts by individual Puerto Rican workers in connection with the 1978 apple harvest season.[5] In addition, all the defendant New York growers were named as defendants in a purported class action filed in the United States District Court for the District of Puerto Rico. *Ceferino Lopez Rivas, et. al. v. F. Ray Marshall, et al.*, Civil No. 78-2175 (D.C.P.R., filed November 9, 1978). Shortly after the instant action was dismissed by the Southern District of New York, another class action suit was filed on behalf

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[5] *See, e.g., Fernandez, et al. v. Albert Angelo & Son*, Civ. No. 78-4257; *Amaro, et al. v. Ernest Greiner*, Civ. No. CS-78-2442; *Garcia, et al. v. Hudson River Fruit Distributing, et al.*, Civ. No. 79-490; *Lamberty, et al. v. Hudson River Fruit Distributors*, Civ. No. CS-78-5903; *Velazquez v. A.R. Mott, Jr.*, Civ. No. CS-79-1700; *Lopez v. Hudson River Fruit Distributing*, Civ. No. CS-79-1701; *Santiago v. Cross Orchards & Storage Co.*, Civ. No. CS-79-99; *Riviera v. M. Hart*, Civ. No. CS-79-492; *Rios, et al. v. Altamont Farms, Inc.*, Civ. No. 78-6106(901); *Cuevas, et al. v. Yonder Farms, Inc.*, Civ. No. PE 79-742; *Molina, et al. v. Mount Levels & Altamont Farms, Inc.*, Civ. No. 78-1775; *Medina v. Moriello Bros.*, Civ. No. 79-2380; *Torres v. Coy*, Civ. No. CS-79-560; *Montes v. Minard Farm, Inc.*, Civ. No. CS-79-558; *Reyes, et al. v. Rocco Currie Enterprises, Inc.*, Civ. No. CS-79-590; *Fonseca, et al. v. Cross Orchards & Storage Co.*, Civ. No. CS-79-617; *Rosa, et al. v. A.J. Dembroski*, Civ. No. CS-79-648; *Delgado, et al. v. Altamont Farms, Inc.*, Civ. No. PE-79-740(907); *Velez v. Goold Orchards, Inc.*, Civ. No. 80-691; *Fonolloza v. Coy & Son*, Civ. No. CS-80-271; *Prosper v. A.J. Dembroski*, Civ. No. 80-187; *Betancourt, et al. v. Collier Farms, Inc.*, Civ. No. 80-160(E); *Pimental, et al. v. Altamont Farms, Inc.*, Civ. No. 81-2229; *Garcia v. Yonder Farms, Inc., Civ.* No. PE-81-705 (907); *Rodriguez v. Goold Orchards*, Civ. No. 79-642.

of mainland and Puerto Rican migrant workers against certain New York apple growers and others, including the Secretary of Labor of the Commonwealth of Puerto Rico. *Valderrama Rios v. Marshall*, No. 79 Civ. 5711 (S.D.N.Y., filed October 22, 1979).[6]

The Commonwealth filed its complaint in the United States District Court for the Southern District of New York on January 12, 1979. The complaint alleged three categories of violations by the defendant New York growers. First, the complaint alleged that eight New York apple growers had failed to provide employment to

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[6] The Puerto Rican workers whom the Commonwealth seeks to represent in this case, have made the following allegations against the Secretary of Labor of the Commonwealth of Puerto Rico in the *Rios* case:

> From 1975 to 1977, the Puerto Rico Department of Labor wrongfully attempted to impose Commonwealth contract conditions on the employment of Puerto Rican workers in the apple harvest in New York and in other states. . . These negotiations were conducted by said Department in such a grossly negligent manner that they were still proceeding after the Jamaican workers had arrived. The result of the Department's actions was that no Puerto Rican farmworkers were employed on the clearance orders in 1975-1977 despite a 20-30% unemployment rate prevailing among the Puerto Rican members of plaintiff class. In 1978, the Puerto Rico Department of Labor supervised the selection, preparation and advance arrangements of the placement process on apple harvest clearance orders from New York and other states in a grossly negligent manner which contributed to the result that Puerto Rican members of plaintiff class failed to obtain employment or were discharged from such employment. In 1979, the Puerto Rico Department of Labor again grossly mismanaged the placement process and ultimately refused all the apple harvest clearance orders with the result that no Puerto Rican members of plaintiff class gained a job in the New York apple harvest under the Department's auspices.
>
> First Amended Complaint ¶ 176, *Valderrama Rios v. Marshall*, *supra*.

some of their Puerto Rican workers when they applied for employment.[7] *Id.* ¶¶ 70-71, 76. Secondly, the complaint alleged that 29 New York apple growers had subjected some of their Puerto Rican workers to work conditions more burdensome than conditions established for temporary foreign workers employed by those defendants. *Id.* ¶ 78. Thirdly, the complaint alleged that 29 New York apple growers had improperly terminated some of their Puerto Rican workers before expiration of their contracts. *Id.* ¶ 80. The complaint requested the district court to declare that the defendant New York growers had breached the terms of their contracts and had violated various statutes and regulations. *Id.* at pp. 36-37. The Commonwealth also requested the district court to permanently enjoin the defendant growers from committing similar violations in the future. *Id.* at p. 37.

About the time the Commonwealth filed its complaint in this case, it also filed a companion suit in the United States District Court for the Western District of Virginia against 52 defendants engaged in the business of growing apples in the Commonwealth of Virginia. *Commonwealth of Puerto Rico on the relation of Carlos S. Quiros v. Alfred L. Snapp & Son, Inc.*, Civil No. 79-0007 (W.D. Va., filed January 12, 1979). The complaint in the Virginia case was virtually identical to the complaint in this case, and the parties filed equivalent briefs. After hearing oral argument, Judge Turk of the Western District of Virginia on April 17, 1979 entered a memorandum opinion and order dismissing the Commonwealth's complaint with prejudice on the ground that the Commonwealth lacked standing as *parens patriae* to prosecute the

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[7] Seven of the eight New York growers are also charged with imposing more burdensome work conditions on and improperly terminating their Puerto Rican workers. *Cf.* ¶ 76 with ¶¶ 78 and 80. Since the employers could only have terminated employees they had hired, their alleged refusal to hire Puerto Ricans obviously did not extend to all Puerto Ricans.

action. *Commonwealth of Puerto Rico, Etc. v. Alfred L. Snapp & Son, Inc.*, 469 F. Supp. 928 (W.D. Va. 1979). Judge Turk concluded that the allegations in the Commonwealth's complaint failed to present a justiciable quasi-sovereign interest since neither the segment of the Commonwealth's population nor the injury to the Puerto Rican economy was of sufficient magnitude to confer *parens patriae* standing and since the Puerto Rican workers allegedly injured stood ready and willing to vindicate their own rights and were in fact actually litigating the same issues in other forums.

Following the lead of Judge Turk, Judge Duffy of the Southern District of New York filed a memorandum endorsement granting the New York apple growers' motion to dismiss. The memorandum endorsement stated simply that:

> For the reasons stated in the decision of Judge James Turk in the related case of *Commonwealth of Puerto Rico, etc. v. Alfred L. Snapp & Son, Inc., et al.*, 469 F. Supp. 928 (W.D. Va. 1979), the within motion to dismiss this action is granted.

On October 9, 1980, the United States Court of Appeals for the Fourth Circuit handed down its decision reversing Judge Turk and holding that the Commonwealth did have *parens patriae* standing to maintain the action. *Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Co. Inc.*, 632 F.2d 365 (4th Cir. 1980) (2-1 decision; Hall, J., dissenting), *petition for cert. filed*, 49 U.S.L.W. 3573 (Feb. 2, 1981) (No. 80-1305). The majority opinion agreed that Judge Turk applied the correct legal standards but disagreed with his conclusions that the affected Puerto Rican workers could effectively litigate the same issues themselves and that neither the segment of the population nor the injury to the Puerto Rican economy was of sufficient magnitude to grant *parens patriae* standing. *Id.* at 369, 370. Judge Hall, the

dissenting judge, stated that the district court applied the proper legal standards and "properly considered the number of people affected by the Growers' alleged activities, the potential economic impact, and the ability of the workers to litigate their own claims." *Id.* at 370-371.

On July 28, 1981, the Second Circuit reversed Judge Duffy and held that the Commonwealth did have standing as *parens patriae* to prosecute the action. The Second Circuit stated that a state possesses a quasi-sovereign interest in its general economy sufficient to support *parens patriae* standing only if "the injury alleged affects the general population of a State in a substantial way," citing *Maryland v. Louisiana*, —— U.S. ——, 49 U.S.L.W. 4562, 4565 (May 26, 1981). *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp, supra*, Slip Opinion, at 4243, 6. The Second Circuit concluded, however, that "[e]ven if those directly injured are not substantial enough in number for their interests to be deemed 'public,' and therefore properly litigated by the state, . . . a broader range of state interests beyond those of the workers are involved. The Commonwealth's efforts to secure the rights of migrant workers will most significantly benefit the general population whose welfare is dependent upon the health of the Puerto Rican economy." *Id.* at 4244. The Second Circuit pointed out that 3,967 Puerto Rican workers were actually placed in agricultural jobs outside the apple industry in 1978 (out of a Puerto Rican population of 2,712,033), a figure which reflects ". . . the importance of migrant labor to the economy of Puerto Rico." *Id.* at 4245. Finally, the Second Circuit dismissed the importance of pending suits filed by some of the Puerto Rican workers themselves, asserting that "[t]he vindication of the rights of all future migrant laborers and the public of Puerto Rico should not be made dependent upon the possible relief obtained by the individual workers." *Id.* at 4247.

REASONS FOR GRANTING THE WRIT

A. The Second Circuit Has Seriously Misapplied This Court's Decisions Concerning *Parens Patriae* Standing.

In holding that the Commonwealth of Puerto Rico had *parens patriae* standing to sue 30 New York apple growers on behalf of, at most, 611 Puerto Rican migrant agricultural workers for alleged breaches of their employment contracts and alleged violations of certain federal statutes and regulations, the Second Circuit seriously misapplied applicable decisions of this Court which set forth the test for *parens patriae* standing.

1. *The injuries alleged do not affect the general population of Puerto Rico in a substantial way.* The Commonwealth of Puerto Rico justifies its standing as *parens patriae* in this case on the basis of an alleged injury to its general economy. Appellants' Brief, at 17; Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, at 14. The mere assertion by a state that a challenged activity seriously affects the general economy of the state is not determinative of the question of whether the state has a justiciable interest in the litigation so as to confer *parens patriae* standing. *See Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 393, 394 (1938); *Oklahoma v. Atchison, T. & S. F. R. Co.*, 220 U.S. 277, 283-84 (1911). It has been generally recognized by this Court and other courts, including the Second Circuit in this case, that a state's quasi-sovereign interest in its general economy "will be deemed sufficiently implicated to support *parens patriae* standing only if 'the injury alleged affects the general population of a State in a substantial way.'" *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp, supra*, Slip Opinion at 4243, citing *Maryland v. Louisiana*, —— U.S. ——, 49 U.S.L.W. 4562, 4565 (May 26, 1981); *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945); *Pennsyl-*

vania v. West Virginia, 262 U.S. 553 (1923); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Son, Inc.*, 632 F.2d 365, 369-70 (4th Cir. 1980); *Commonwealth of Pennsylvania by Shapp v. Kleppe*, 533 F.2d 668, 674-75 (D.C. Cir. 1976); and *Land O'Lakes Creameries, Inc., v. Louisiana State Board of Health*, 160 F. Supp. 387, 389 (E.D.La. 1958).

This Court has stated that ". . . unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976). Permitting courts to base a finding of injury to a state's general economy on the kind of the unadorned speculation and flimsy justification engaged in by the Second Circuit in this case would render meaningless the generally acknowledged requirement that the general population of a state must be affected in a substantial way for *parens patriae* standing to be found.

Viewed from all perspectives, it is apparent that the general population of Puerto Rico could not conceivably be affected in a substantial way by the alleged actions of the 30 New York apple growers. According to the 1970 census, Puerto Rico had a population of 2,712,033. *See* World Almanac and Book of Facts (1978). The 611 Puerto Rican workers who were allegedly referred to the defendant New York apple growers during the 1978 harvest season comprised less than three hundredths of one percent (0.03%) of the Puerto Rican population.

Even if the Commonwealth were to prove all its allegations against the 30 New York growers in this case, the only Puerto Ricans who could possibly benefit would be those migrant agricultural workers interested in picking apples in the Hudson Valley of New York State for the 30 named New York growers. In theory, every Puerto Rican may be a candidate for such jobs,

but the figures indicate otherwise. No Puerto Ricans were referred to East Coast apple growers prior to 1976. In 1976, a total of 613 Puerto Rican workers were employed by all East Coast apple growers. In 1977, only 93 Puerto Ricans were referred to all East Coast apple growers. In 1978, the numbers were swollen because of the unique U.S. Department of Labor program that provided over $275,000 to pay transportation. In 1979, the Commonwealth refused to refer any Puerto Ricans to the East Coast apple growers. In 1980, only 219 Puerto Ricans worked in the entire East Coast apple harvest, a mere 107 for New York apple growers. The 30 New York apple grower petitioners hire less than 2,000 domestic and foreign apple pickers each year. Even, if Puerto Ricans were to fill every position, less than one-tenth of one percent (0.1%) of the Puerto Rican population would be so employed. Moreover, as the district court noted, 469 F. Supp. at 934, the jobs in dispute were temporary in nature with a maximum duration of approximately two months, hardly the type of jobs that would have a substantial impact on the Commonwealth's economy. The Second Circuit's observation that "[t]he figures reflect the importance of migrant labor to the economy of Puerto Rico," Slip Opinion, at 7-8, simply does not withstand scrutiny.

2. *The Commonwealth is attempting to litigate as a volunteer the personal claims of a small group of its citizens.* The Court has declared the "settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 655 (1976); *see also Maryland v. Louisiana*, *supra* at 4567 n. 18; *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Oklahoma v. Atchison, T. & S.F.R. Co.*, 220 U.S. 277 (1911); *Kansas v. Colorado*, 204 U.S. 331 (1907). By allowing the Commonwealth to sue as

parens patriae in this case, the Second Circuit is permitting the Commonwealth to litigate as a volunteer the personal claims of a mere handful of its citizens.

It is clear from the Commonwealth's complaint that this lawsuit represents a collectivity of complaints that some Puerto Ricans may have against some New York apple growers. The complaint seeks a declaration that the 30 New York growers breached their employment contracts with the Puerto Rican workers. First Amended Complaint, at p. 37. Each Puerto Rican worker had an employment relationship with only one of the 30 New York apple growers. *Id.* ¶¶ 69, 70, 71 and 72. Only eight of the 30 New York growers allegedly refused to employ Puerto Rican workers. *Id.* ¶¶ 70 and 71. Seven of those eight growers are also charged with discriminating against other Puerto Ricans, which means that their alleged failure to hire could not have been a blanket policy aimed at all Puerto Rican workers. *Cf.* ¶ 76 with ¶¶ 78 and 80. The complaint alleges that some Puerto Rican workers were terminated unlawfully "for no stated reason, or on one or more of the following pretexts invoked by one or more defendants herein: (a) allegedly no work availability; (b) alleged failure to pick sufficient quantities of apples; (c) allegedly picked damaged fruit; (d) allegedly no social security card." *Id.* ¶ 73. Not every Puerto Rican was illegally terminated since the complaint concedes that approximately 50 Puerto Ricans still had employment three weeks later. *Id.* ¶ 68. The complaint also alleges that some Puerto Rican workers "were subjected by defendants and their agents and employees to one or more of the following work conditions, when Jamaicans were not subjected to such conditions," listing 16 separate conditions. *Id.* ¶ 74.

Thus, the nature of the employment dispute between any one Puerto Rican worker and his employer would vary from worker to worker and employer to employer,

and the validity of each Puerto Rican's complaint would depend on the facts and circumstances of his case. For example, several of the "pretexts" allegedly invoked by the growers for terminating their Puerto Rican workers, *id.* ¶ 73, would justify the termination of any employee, *e.g.*, failure to pick sufficient quantities of apples or picked damaged fruit. Any court hearing the case would have to sift the facts of each employer-employee relationship to determine whether termination was justified in each case. Conceivably, one Puerto Rican might prove that he was discriminated against, but not the other Puerto Ricans employed by the same apple grower. Furthermore, the fact that one of the defendant apple growers may have violated the rights of one or more of his Puerto Rican workers would not mean that the other defendant apple growers had similarly violated the rights of their Puerto Rican workers.[8] This case, involving a conglomeration of varying sets of facts and circumstances, differs dramatically from cases like *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), which involved freight rates which applied to all citizens of a state uniformly, or *Maryland v. Louisiana*, *supra*, which involved a tax that applied equally to all gas imported into Louisiana not previously subjected to taxation by another state, or *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), which involved a West Virginia law which would have affected all interstate customers equally.

3. *The affected Puerto Rican workers have demonstrated their ability to litigate the issues themselves.*

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[8] The Second Circuit erroneously imagined "a statewide conspiracy to discriminate against Puerto Ricans by apple growers," Slip Opinion, at 4245, but there is absolutely *no* allegation of conspiracy in the complaint. *Cf. Ostrer v. Aronwald*, 567 F.2d 551 (2d Cir. 1977) (court will dismiss complaint alleging conspiracy to deprive a person of his constitutional rights where allegations are vague or conclusory).

Allowing the Commonwealth to proceed as *parens patriae* would duplicate the litigation already instituted by some of the Puerto Rican workers the Commonwealth seeks to represent in this suit. The inability of individual litigants to secure relief on their own as justification for *parens patriae* standing has been part and parcel of the doctrine from the start. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972). *Cf. Maryland v. Louisiana, supra* at 4567 n. 18; *Oklahoma v. Atchison, T. & S.F.R. Co.*, 220 U.S. 277, 289 (1911); *Missouri v. Illinois*, 180 U.S. 208, 241 (1908); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900). It is clear that the affected individuals in this case stand ready, willing and able to represent their own interests effectively, bearing out this Court's observation that "[p]rivate parties are not as powerless . . . as the state suggests." *Hawaii v. Standard Oil Co., supra* at 265. A number of the defendant New York apple growers have been sued by Puerto Rican workers in connection with the 1978 apple harvest season. In one purported class action lawsuit brought in federal court, the plaintiffs seek both monetary damages and injunctive relief against the New York growers. *See Juan Valderrama Rios, et al. v. Marshall, et al.*, No. 79 Civ. 5711 (S.D.N.Y., filed October 22, 1979). To allow the Commonwealth to proceed in a *parens patriae* capacity in this action would result in a duplication of litigation involving the same facts and circumstances, with the Commonwealth seeking injunctive relief against a defendant grower in one action and Puerto Rican workers seeking monetary damages and possibly injunctive relief against the same grower in another action, possibly with conflicting results.

4. *The Second Circuit completely ignored the possibility of resolving employee complaints through the U.S. Department of Labor's Employment Service Complaint System.* The Second Circuit's opinion makes no mention of the U.S. Department of Labor's Employment Service

Complaint System which was created to investigate and resolve complaints that an employer had violated Employment Service regulations. *See* 20 C.F.R. Part 658 (1978). In fact, the very Employment Service regulations which the Commonwealth purports to enforce by means of this lawsuit specify the procedures to be followed when there is cause to believe that an employer has not lived up to the terms of his temporary labor certification. 20 C.F.R. §655.210 (1978). The U.S. Department of Labor has the authority to initiate an investigation on its own when it has probable cause to believe that an employer has not lived up to the terms of his temporary labor certification, 20 C.F.R. § 655.210(a) (1978), and the Department's regulations provide for the investigation of all employee complaints relating to failure to comply with the terms of the job offer or applicable regulations. 20 C.F.R. Part 658 (1978). The Employment Service regulations clearly provide that a labor supply state, such as the Commonwealth in this case, will play no role in the investigation of employee complaints when the work has been performed in another state, other than forwarding the complaints to the state where the work was performed. 20 C.F.R. § 658.412(d) (1978).

Obviously, the U.S. Department of Labor's Employment Service Complaint System provides a means of investigating and resolving employee complaints without the federal courts getting involved. In fact, the New York State employment agency investigated 120 Puerto Rican complaints in 1978 and was unable to substantiate any of them. Only 10 of the Puerto Ricans who filed complaints elected to appeal the decisions of the New York State agency to the Regional Administrator's Office as specifically provided for in the U.S. Department of Labor's regulations. If the Commonwealth of Puerto Rico were not satisfied with the results of the investigations and had information that the State agency had

failed to consider, it should have brought such facts to the attention of the Regional Administrator. In fact, the Commonwealth did file an appeal on behalf of at least one Puerto Rican worker. If the Commonwealth lacked any information that would have established violations by the New York apple growers, it had no basis for bringing this lawsuit. In either case, the Commonwealth's attempt to sue the New York apple growers for alleged violations of Employment Service regulations flouts the very regulations it seeks to enforce. Permitting the Commonwealth to skirt the Employment Service Complaint System which was designed to resolve such disputes will overburden the federal courts with cases that could have been and, for the most part, were resolved administratively.

5. *Only the federal government, not the Commonwealth, could be parens patriae with respect to the enforcement of federal regulations.* In addition to seeking a declaration that the New York growers breached their employment contracts with their Puerto Rican workers, the Commonwealth also contends that the New York growers violated various *federal* statutes and regulations, specifically the Immigration and Nationality Act, the Wagner-Peyser Act, and the regulations promulgated thereunder. First Amended Complaint ¶¶ 1, 76, 78 and 80 and pp. 36-37. Neither the Immigration and Nationality Act nor the regulations promulgated thereunder assigns any role in administering the program to the Commonwealth of Puerto Rico, responsibility resting solely in the Immigration and Naturalization Service and the U.S. Department of Labor. 8 C.F.R. §§ 2.1 and 214.2(h)(3) (1978); 20 C.F.R. Part 655 (1978). The regulations promulgated pursuant to the Wagner-Peyser Act specifically provide that a labor supply state such as the Commonwealth will play no role in the investigation of employee complaints. 20 C.F.R. § 658.412(d) (1978). If anybody has the right as *parens patriae* to represent United States citizens under the federal statutes and regulations involved in this case, it is the federal govern-

ment and not the Commonwealth of Puerto Rico. *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 474 (Ch. J. Stone, dissenting).

The Commonwealth's action also raises the question of whether it should be permitted to second-guess the U.S. Department of Labor by bringing a *parens patriae* action for the enforcement of U.S. Department of Labor regulations after the U.S. Department of Labor has already investigated and found no basis for the alleged violations. Permitting enforcement activities of the same regulations by both the U.S. Department of Labor and the Commonwealth of Puerto Rico would be needlessly duplicative and would wastefully consume judicial resources. Moreover, the growers would be subjected to impossible burdens if they had to defend themselves, in turn, against administrative investigations by the U.S. Department of Labor, *parens patriae* lawsuits by the Commonwealth of Puerto Rico, and individual lawsuits by the Puerto Rican workers themselves.

B. This Case Is One of First Impression for This Court and An Appropriate One for Review.

The Court has addressed the doctrine of *parens patriae* standing numerous times, but this appears to be the first case to raise the issue in the context of alleged employment discrimination and contractual violations. Counsel for petitioners are aware of no other case which has held that a state has standing as *parens patriae* to rectify alleged employment discrimination against a small number of its citizens in another jurisdiction. The Second Circuit's decision, if allowed to stand, would so loosen the test for *parens patriae* standing that it would open up the federal courts to a whole new class of lawsuit. The Second Circuit's decision would give the Commonwealth a license to litigate in every state where Puerto Rican migrant workers might happen to work. Any employment dispute coupled with an allegation of discrimination could easily produce another *parens patriae* lawsuit under the Second Circuit's lax standard. The Commonwealth has noted that it refers its workers to

other employers, both agricultural and nonagricultural, in Tennessee, Oklahoma, North Carolina, South Carolina, Virginia, West Virginia, and Pennsylvania, among other states. The Western District of Virginia stated that "[t]he Commonwealth informed this court that it intends to use this power vigorously to protect its migrant workers involved in the harvest of other crops as well." 469 F.Supp. at 934. Many states besides Puerto Rico supply workers to employers in other states through the Interstate Clearance System. This case would obviously establish a precedent for all states to sue employers in other states whenever their citizens become involved in employment disputes.

C. The Issue Has Clearly Divided the Judges Who Have Considered It.

Since the Second Circuit's decision agrees with the Fourth Circuit's decision in the *Snapp* case, there is no conflict between circuits. Nonetheless, the issue of whether the Commonwealth has *parens patriae* standing to prosecute this action has clearly divided the judges who have considered it. Both district judges held that the Commonwealth lacked *parens patriae* standing, and one circuit court judge agreed. A total of eight judges have considered the issue, and they have divided five to three on the issue. At the very least, serious doubts exist as to whether the Commonwealth should be permitted to sue as *parens patriae* in a case like this.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the decision of the court of appeals.

Respectfully submitted,

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August 20, 1981

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 Civil 199 (KTD)

THE COMMONWEALTH OF PUERTO RICO
on the Relation of CARLOS S. QUIROS, Secretary,
Department of Labor and Human Resources,
Plaintiff

—against—

LOUIS BRAMKAMP, *et al.*,
Defendants

JUDGMENT

Defendants having moved the Court to dismiss, pursuant to Rule 12(b)(1)(6) and (7), of the Federal Rules of Civil Procedure, and the said motion having come on before the Honorable Kevin Thomas Duffy, United States District Judge, and the Court thereafter on September 28, 1979, having handed down its memorandum endorsement granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That the action be and it is hereby dismissed.

Dated: New York, N.Y.
October 2, 1979

/s/ [Illegible]
Clerk

ENDORSEMENT

The Commonwealth of Puerto Rico et al. v. Louis Bramkamp, et al. 79 Civ. 0199 (KTD)

For the reasons stated in the decision of Judge James Turk in the related case of *Commonwealth of Puerto Rico etc. v. Alfred Snapp & Son, Inc. et al.*, 469 F.Supp 928 (W.D. Va. 1979), the within motion to dismiss this action is granted.

SO ORDERED.

/s/ Kevin Thomas Duffy
U.S.D.J.

Dated: New York, New York
September 27, 1979

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 79-0007 (H)

THE COMMONWEALTH OF PUERTO RICO,
ON THE RELATION OF CARLOS S.
QUIROS, SECRETARY, DEPARTMENT OF
LABOR AND HUMAN RESOURCES,
Plaintiff

v.

ALFRED L. SNAPP & SON, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

TURK, Chief Judge.

During the spring and summer of 1978, weather and climatic conditions combined to produce a record apple crop in the orchards along the eastern coast of the United States. This suit concerns the recruitment of workers to harvest that crop.

Stated briefly, a statutory and regulatory scheme has been established by the federal government to insure that domestic workers are given priority over foreign workers for employment opportunities within the United States. *See generally*, Wagner-Peyser Act, 29 U.S.C. § 49, *et seq.*, Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq;* 20 C.F.R. Part 655; 8 C.F.R. § 214(h)(3). As the time for harvest draws near, the apple growers, as do other crop growers, avail themselves of this system, known as the United States Employment Service, to secure laborers to work the harvest. This service is, in fact, a national system of public employment offices.

If workers cannot be found locally, the interstate facilities are utilized to locate available workers in the domestic labor market. For purposes of this service, Puerto Rican workers are considered to be part of the domestic labor force. 29 U.S.C. § 49b(b). If the demand for workers exceeds the domestic labor supply, the employers may petition the Secretary of Labor for a certificate of need for foreign labor, 8 C.F.R. § 214.2(h)(3), 20 C.F.R. Part 655, and, if granted, apply to the Attorney General for non-immigrant visas for persons to perform temporary labor. 8 U.S.C. § 1101(a)(15)(H)(ii); 8 U.S.C. § 1184(c).

Commencing in April, 1978, apple growers in New York, Maryland, Virginia, and West Virginia sought to secure seasonal labor for the late summer and early autumn apple harvest through the interstate clearance system. The implementation of this process, however, was to run a troubled, confused and turbulent course. Ultimately, on the day on which the brief harvest period was to begin, far fewer workers were in the orchards than were needed for the task. This situation posed the very real danger that certain varieties of apples would over-ripen on the trees, thereby greatly diminishing their commercial value. Shortly before the harvest was to begin, the apple growers of the several states filed suit in this court seeking a mandatory injunction against the United States Secretary of Labor, the Commissioner of the Immigration and Naturalization Service, and their subordinates, to permit the recruitment and employment of foreign workers. The Commonwealth of Puerto Rico was permitted to intervene on behalf of its citizens who allegedly would have been displaced by the employment of foreign workers. To insure that the harvest would be completed, this court entered a preliminary injunction ordering that a certain number of foreign workers be allowed to enter this country to pick the apples. *Frederick County Fruit Growers Association, Inc., et al. v. Mar-*

shall, et al., Civ. Action No. 78—0086(H) (August 31, 1978), *appeal dismissed and remanded*, 594 F.2d 857 (4th Cir. 1979) (unpublished).

During the arguments preceding the entry of the preliminary injunction, it was represented to this court that the apple growers recognized their obligation to give priority in their hiring process to the Puerto Rican workers notwithstanding a court order permitting the employment of foreign workers. The primary thrust of the instant suit is the assertion by the Commonwealth of Puerto Rico, on the relation of Carlos S. Quiros, Secretary of the Department of Labor & Human Resources, that the Virginia apple growers failed to fulfill their acknowledged obligation.

The present action was commenced on January 11, 1979. The named defendants are numerous companies and individuals engaged in the apple industry, all of whom reside in Virginia. Jurisdiction is predicated upon 28 U.S.C. § 1331, and 28 U.S.C. § 1337. By its second amended complaint, plaintiff alleges that each defendant filed a clearance order with the Virginia Employment Commission, an agency associated with the Federal Employment Service System, containing job orders for a specified number of unskilled agricultural laborers. The Puerto Rico Employment Service, another member of the interstate clearance system, received job offers from *all* east-coast apple growers totalling 2,318. By August 14, 1978, plaintiff allegedly had recruited 1,094 Puerto Rican workers and thereafter continued its recruitment process until a sufficient number of workers were obtained to satisfy the job orders. Of the 2,318 Puerto Rican workers recruited by plaintiff, only 992 such workers were transported to the mainland, allegedly because of oral advice received from the United States Department of Labor to the effect that the growers had refused to employ those Puerto Rican workers who had arrived previously. The

Virginia growers who are defendants here are alleged to have made commitments to employ 787 Puerto Rican workers although only 420 workers arrived in the Virginia orchards as a result of the Labor Department's warning. Within three weeks of their arrival, fewer than 30 remained employed. It is alleged that the remainder were either unable to secure the promised employment or, if employed, were dismissed for lack of productivity or picking damaged fruit. Plaintiffs also alleged that the Puerto Rican workers were subjected to less favorable working conditions than the Jamacians who had been recruited pursuant to the court order. Such discrimination allegedly benefited the productivity of the Jamaican workers to the detriment of that of the Puerto Ricans. For the alleged failure to employ, unequal treatment, and improper termination, plaintiff seeks a declaration that defendants' actions were in violation of the Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.*, the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, as amended, and the regulations promulgated under each, and permanent injunction to enjoin any future violation of the same.

On February 15, 1979, defendants filed a motion to dismiss asserting, *inter alia*, that plaintiff lacked standing to bring this action. After all briefs were submitted, the court heard oral argument on March 7, 1979. After a careful evaluation of the facts alleged in the complaint in light of the evolution of the doctrine of *parens patriae* standing, the court is of the opinion that the motion is well taken and that dismissal of the complaint is required.

The concept of *parens patriae* standing is a rather elusive one which does not lend itself to precise definition. As a preliminary matter, it should be distinguished from those instances where a state seeks to redress an injury sustained in its proprietary capacity, as where a state sues as an injured consumer. *See, e.g., Hawaii v. Stand-*

ard Oil Co., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Before assessing the merits of the instant case, three observations should be made regarding the present posture of this case. First, the Commonwealth brings this suit solely in its capacity as *parens patriae*. No separate proprietary interest in this litigation has been asserted. At best, any such interest would be predicated necessarily upon the harm to the general economy, the consequential reduction in state revenues, and the increased payment of public benefits. Taken to its logical conclusion, this proposition would permit a state to challenge any business or governmental decision which would adversely affect its economy. The connection between this proprietary concern of the state and alleged wrong is too attenuated to be cognizable for purposes of standing. *Pennsylvania ex rel. Shapp v. Kleppe*, 174 U.S. App.D.C. 441, 445, 533 F.2d 668, 672 (1976). Rather, redress for these wrongs must be sought in the role of *parens patriae*. Second, if *parens patriae* standing is appropriate, the Commonwealth of Puerto Rico is an entity capable of asserting that interest. *Commonwealth of Puerto Rico v. S.S. Zoe Calocotroni*, 456 F.Supp. 1327 (D.P.R. 1978); *compare City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976); *Board of Supervisors of Fairfax County, Virginia v. United States*, 408 F.Supp. 556 (E.D.Va. 1976), *appeal dismissed* 551 F.2d 305. (4th Cir. 1977). Finally, plaintiff seeks only declaratory and injunctive relief. Thus, the court is spared the necessity of wrestling with the thorny problems inherent in *parens patriae* damage actions. *See generally, Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972) (anti-trust damages); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied* 412 U.S. 908, 93 S.Ct. 2291, 36 L.Ed.2d 974 (1973) (class action); *West Virginia v. Chas. Pfizer and Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Colter Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.

2d 115 (1971) (class action); *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D.Cal. 1970), *cert. denied* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed. 2d 336 (1973) (class action); *In re Montgomery County Real Estate Litigation*, 452 F.Supp. 54 (D.Md. 1978); *Note, State Protection of its Economy and Environment: Parens Patria Suits for Damages*, 6 Columbia J.L. & Soc.Prob. 411 (1970).

As in all other cases where the standing of a party to bring suit is in issue, the court is called upon to determine whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). No one could challenge the sincerity with which the Commonwealth now seeks to vindicate the interests of its citizens. The essential "concrete adverseness" being assured as a practical matter, the court nevertheless must inquire further to ensure that a state has alleged more than "a mere 'interest in a problem.'" *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972). A state cannot, of course, volunteer to litigate a collection of the private claims of its citizens merely because it expresses an interest in doing so. *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976); *New Hampshire v. Louisiana*, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883). To satisfy the threshold jurisdictional requirement, a sovereign entity seeking to act in the capacity of *parens patriae* must assert a "quasi-sovereign" interest. *Hawaii v. Standard Oil Co., supra.* Whether such an interest has been stated depends essentially upon the type of interest asserted and the magnitude of the harm involved.

A quasi-sovereign interest has been defined variously as "an interest independent of and behind the titles of its

citizens," *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 619, 51 L.Ed. 1038 (1907), and as "an interest apart from that of the individuals affected," *Pennsylvania v. West Virginia*, 262 U.S. 553, 592, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923). Thus, the sovereign interests implicated in the litigation must be sufficiently independent of the interests of the individual citizens to justify state *parens patriae* standing; the injuries to the state and the citizens need not, and usually cannot, be wholly independent. Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, *supra*. Derived from the original power of the King to act as "parent of the country" for the protection of those unable to act for themselves, the traditional concept of a quasi-sovereign interest has been expanded during this century to reach issues involving the health, safety, and welfare of the state's residents. *Hawaii v. Standard Oil Co.*, *supra*. Today, a state may bring suit to protect the public interest so long as that interest is not so vague and remote as to appear ethereal. *Compare Kelley v. Carr*, 442 F.Supp. 346 (W.D. Mich. 1977) *with Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F.Supp. 500 (E.D.Pa. 1973).

The quasi-sovereign interest in the present case arises from the interest of the Commonwealth in the health of its general economy. It is clear that Puerto Rico has been plagued with seriously high levels of unemployment. During September, 1978, 18.5% of the adults in the labor market were unemployed. The problem was even worse in the rural areas where the unemployment figure reached 23%. Plaintiff argues that the challenged activities of defendant served to frustrate its efforts to obtain greater employment opportunities for its citizens. As a consequence, the expansion of the supply of money in circulation was less than it otherwise would have been, fewer tax revenues were gathered, and additional public

benefits were required to be expended. The Commonwealth also asserts an interest in the proper application of federal laws which mandate a preference for Puerto Rican workers over foreign workers. Non-compliance with these laws serves to exacerbate the already serious employment problem present on the island. Thus stated, plaintiff has alleged an interest in the protection and preservation of its general economy, an interest which clearly implicates its quasi-sovereign capacity. *Georgia v. Pennsylvania Railroad Co., et al.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923).

Once the quasi-sovereign interest has been identified, it must be assessed against the backdrop of the development of the *parens patriae* doctrine.[1] An analysis of the principal decisions which sketch the nebulous perimeter of the theory discloses three crucial factors which influence the decision to grant or deny standing: the size of the segment of the population that has been adversely affected, the magnitude of the harm inflicted, and the practical ability of those injured to obtain complete relief.

Since the propriety of this expanded motion of *parens patriae* standing was recognized in *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347 (1900), it has been emphasized that the State must be seeking to rep-

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[1] Although many of the decisions which developed the *parens patriae* doctrine dealt primarily with questions of the original jurisdiction of the Supreme Court pursuant to Article III § 2 of the United States Constitution, they do provide precedential value in the case at bar. *Hawaii v. Standard Oil Co., supra.* Similarly, the principles of these cases are applicable notwithstanding the Eleventh Amendment considerations which appear in some of the cases. *Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 22-23 n. 26 (3rd Cir. 1975).

resent a significant portion of its populace. In *Louisiana v. Texas*, *supra* and *Oklahoma v. Atchison, Topeka and Santa Fe Railway Co.*, 220 U.S. 277, 31 S.Ct. 434, 55 L.Ed. 465 (1911), the Court noted that original jurisdiction was absent when the suit by the State was for the vindication of the grievances of particular individuals. Consistent with this thesis, *parens patriae* standing has been denied whenever the litigation was intended to benefit the individual interests of a narrow class of citizens, such as a particular industry. *Oklahoma v. Atchison, Topeka and Santa Fe Railway Co.*, *supra* (freight shippers); *Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707, 64 S.Ct. 1043, 88 L.Ed. 1551 (1944) (strawberry industry); *accord: Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F.Supp. 387 (E.D. La. 1958) (dried milk manufacturers); *but see Louisiana v. Weinberger*, 404 F.Supp. 894 (E.D. La. 1975) (turtle industry). Nor may a state undertake to represent a mere collectivity of purely personal claims. *Pennsylvania v. New Jersey*, *supra* (tax claims); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 58 S.Ct. 954, 82 L.Ed. 1416 (1938) (creditors and depositors of a state bank); *New Hampshire v. Louisiana*, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883) (bond holders). In contrast to these cases are those where a substantial segment of the States citizens has a deep concern with the success of the litigation, e.g. *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497 (1901); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923). In *Missouri v. Illinois*, *supra*, an artificial canal had been constructed to allow the sewerage of the City of Chicago to flow into the Mississippi River. Faced with an alarming increase in the rate of mortality from typhoid fever and other contagious diseases as a result of the pollution of the river, the State of Missouri sought to enjoin the discharge of sewerage. The Court noted that not only would the large communi-

ties located on the river be affected, but the economic repercussions would "injuriously affect the entire state." Id. at 241, 21 S.Ct. 331.[2] Some twenty years later, the Court was called upon to decide whether West Virginia, then the largest domestic producer of natural gas, could enact legislation which would severely curtail the flow of natural gas into Ohio and Pennsylvania. *Pennsylvania v. West Virginia, supra.* It was represented to the Court that approximately 1,500,000 citizens of Pennsylvania and 3,625,000 citizens of Ohio were dependent upon the natural gas produced in West Virginia. *Id.* at 590, 43 S.Ct. 658. Finding, that the affected consumers constituted a "significant portion of the State's population," *Id.* at 592, 43 S.Ct. at 663, the Court permitted the action to proceed to judgment. Thus, once the segment of the population adversely affected by the challenged activity approaches proportions which could be considered "significant", the public interest transcends the interest of the individual citizens, thereby allowing the state to seek to vindicate the broader cause.

Consideration must also be given to the magnitude of the harm which is caused or threatened to be caused by the asserted wrong. The proposed termination of natural gas supplies in *Pennsylvania v. West Virginia, supra* would have clearly led to a substantial disruption of the local economies of Ohio and Pennsylvania. An impact of similar dimensions was alleged in *Georgia v. Pennsylvania Railroad Co., et al.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) when Georgia complained that the twenty defendant railroad companies had conspired to fix non-competitive rates and charges for the transportation of freight. As a result, Georgia alleged that its economy was in a state of arrested development, its meas-

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[2] Missouri eventually prevailed in this litigation and the discharge of sewerage into the Mississippi River was enjoined. *Missouri v. Illinois*, 200 U.S. 496, 26 S.Ct. 268, 50 L.Ed. 572 (1906).

ures to diversify frustrated, and its access to the national market restricted. *Id.* at 444, 65 S.Ct. 716. Georgia was also considered to be the proper party plaintiff when it sought to enjoin the discharge of noxious gas which had caused the wholesale destruction of forests, orchards, and crops in a five county area. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 27 S.Ct. 618, 51 L.Ed. 1038 (1907). Even where the direct injury falls upon a relatively narrow class of persons, a state may still be allowed to proceed with the action if there are substantial generalized economic effects. *See Hawaii v. Standard Oil Co., supra; Pennsylvania ex rel. Shapp v. Kleppe, supra.* The Court must therefore determine whether the adverse conditions flowing from the challenged conduct are sufficiently severe and widespread as to constitute a wrong against the public interest.

Lastly, the ability of a state to represent its citizens is dependent in part on the presence or absence of other potential or actual plaintiffs who could obtain substantially similar relief. This consideration stems from the observation made by the Court in *Missouri v. Illinois, supra* that individual suits for personal injuries would provide "wholly inadequate and disproportionate remedies" in light of the grave threat to the health of the state posed by the sewerage discharge. *Id.* at 241, 21 S.Ct. 331. Since that time, the Court has consistently denied *parens patriae* states to state plaintiff's whenever it appeared that the individual citizens were capable of maintaining and prosecuting their own actions for relief. *Pennsylvania v. New Jersey, supra; Hawaii v. Standard Oil Co., supra; see also New Hampshire v. Louisiana,* 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883). The need for state representation in those instances being obviated, it then becomes apparent that the state plaintiff is attempting to vindicate a collection of private interests rather than its own quasi-sovereign interest.

Having contrasted the allegations in the instant complaint against this background, the court is of the opinion that the Commonwealth may not proceed as *parens patriae*. In sheer numbers alone, it is clear that relatively few residents of Puerto Rico were harmed directly by the alleged activities of defendants. At best, only 787 persons out of a total population of 2,712,033 [3] were so effected. This segment of the population falls far below the "substantial majority" suggested by some courts. *Pennsylvania ex rel. Shapp v. Kleppe, supra*, 174 U.S. App.D.C. at 448, 533 F.2d at 675. It must also be noted that the jobs which are the subject of this litigation were temporary in nature with a maximum duration of approximately two months. Given these facts, it is apparent that the impact of the alleged wrongs upon the general economy of Puerto Rico was relatively slight and that any harm which might have ensued was neither sufficiently severe nor generalized to permit the Commonwealth to take up the cause.

Plaintiff maintains that the Secretary of the Department of Labor and Human Resources has been charged with a statutory duty to protect the rights of the Puerto Rican migrant workers, 3 Pub. L. 87, as amended, and that such authority empowers the Secretary to represent their interests in this action. The Commonwealth informed this court that it intends to use this power vigorously to protect its migrant workers involved in the harvest of other crops as well. While a state could be precluded from commencing an action absent such authority, a statutory enactment cannot, in and of itself, confer Article III standing upon a state plaintiff to sue in the federal courts. *Land O'Lakes Creameries v. Louisiana State Board of Health*, 160 F.Supp. 387 (E.D. La. 1958) The premise on which the Commonwealth proceeds

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[3] 1970 census as contained in the *World Almanac and Book of Facts* (1978).

is, of course, that the individual victims are unable as a practical or realistic matter to represent their own interests effectively. Despite this pessimism, these "[p]rivate citizens are not as powerless, however, as the State suggests." *Hawaii v. Standard Oil Co., supra*, 405 U.S. at 265, 92 S.Ct. at 893. It has been represented to the court by counsel for both parties that numerous individual law suits, as well as a broad based class action suit, have been filed in the Puerto Rican and federal courts by some of the displaced workers against some of the growers, including several who are defendants herein. Should the plaintiffs in those actions prevail on the merits, no greater relief could be obtained from this court. Since those most directly affected stand ready and willing to vindicate their own rights, the imperative for state intervention is absent. The court can detect no valid purpose to be served by allowing this action to proceed when the fundamental issues are already being litigated elsewhere.

To reiterate, the court finds that the allegations in the complaint fail to present a justiciable quasi-sovereign interest. Neither the segment of the population nor the injury to the Puerto Rican economy is of sufficient magnitude. On balance, the private interests of the victimized class appear to predominate over the alleged broader public interest and, in fact, are being actively pursued in other judicial forums. This private litigation renders the efforts of the Commonwealth gratuitous and empty. The issue here is not one of sincerity of motive. Rather, it is one of practical judicial administration. When the asserted public interest is, upon closer inspection, relatively narrow in scope, a court must question the propriety of *parens patriae* standing. Given the particular circumstances of this case, the court is constrained to hold that the Commonwealth is not entitled to proceed in that capacity. An appropriate order will this day be entered.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 724—September Term, 1980

(Argued February 4, 1981 Decided July 28, 1981)

Docket No. 79-7777

THE COMMONWEALTH OF PUERTO RICO ON THE RELATION OF CARLOS S. QUIROS, SECRETARY, DEPARTMENT OF LABOR AND HUMAN RESOURCES,
Plaintiff-Appellant,

—against—

LOUIS BRAMKAMP, *et al.*,
Defendants-Appellees.

Before:

FEINBERG, *Chief Judge,*
NEWMAN, *Circuit Judge,*
and MISHLER,* *District Judge.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Kevin Thomas Duffy, Judge, dismissing plaintiff's complaint for lack of standing as *parens patriae.*

Reversed and remanded.

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* Honorable Jacob Mishler, Senior United States District Judge, Eastern District of New York, sitting by designation.

MISHLER, *District Judge*:

On January 12, 1979 the Commonwealth of Puerto Rico filed a complaint in the United States District Court for the Southern District of New York against 55 defendants engaged in the apple-growing industry in New York State.[1] The Commonwealth seeks to declare illegal and enjoin alleged discrimination in the hiring and treatment of Puerto Ricans as temporary agricultural laborers. The acts of defendants are claimed to be in violation of the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. §§ 49-49k (Supp. 1980), the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101-1524 (Supp. 1981), and regulations promulgated thereunder.

Shortly prior to the commencement of this action the Commonwealth filed a suit in the United States District Court for the Western District of Virginia against 52 defendants engaged in the apple-growing industry. *Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc., et al.*, Civ. No. 79-0007 (W.D. Va. January 12, 1979). The complaint in the Virginia case is virtually identical to the one in the instant action.

The defendants herein moved to dismiss the complaint. One asserted basis for dismissal was that the Commonwealth lacked standing to prosecute the action. On April 17, 1979, Judge Turk of the Western District of Virginia, faced with the identical issue, filed a memorandum opinion and order dismissing the Commonwealth's complaint on the ground that it lacked standing as *parens patriae*. *Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc., et al.*, 469 F. Supp. 928 (W.D. Va. 1979). On September 28, 1979, Judge Duffy filed a memorandum granting defendants' motion to dis-

[1] Of the 55 defendants, 30 are employers and 25 are either officers, partners or employees thereof.

miss the action commenced in the Southern District of New York on the basis of the reasoning found in the decision of Judge Turk. However, the Court of Appeals for the Fourth Circuit subsequently reversed the decision of Judge Turk, finding that the Commonwealth of Puerto Rico has standing as *parens patriae*. *Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc.*, 632 F.2d 365 (4th Cir. 1980). Thereafter, argument on this appeal was heard.

FACTS

Each fall season thousands of temporary farm workers are needed by East Coast apple growers to bring in the apple harvest. Because workers are usually not available in adequate numbers in the immediate locality, growers have customarily employed both out-of-state and foreign workers.

With respect to foreign labor, the Immigration and Nationality Act, as amended, 8 U.S.C. §§ 1101-1524 (Supp. 1981), authorizes the admission of aliens to serve as temporary agricultural laborers only "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii). The Immigration and Naturalization Service regulations insure the exhaustion of the domestic work force by requiring that a grower's petition for the admission of aliens must be accompanied by a certification from the Secretary of Labor that qualified domestic workers are not available. 8 C.F.R. § 214.2(h)(3). The temporary labor regulations issued by the Secretary of Labor provide that such certification will issue only after an active attempt to recruit domestic workers has been made. 20 C.F.R. § 655.203(d).

The recruitment of domestic workers is usually undertaken through the Interstate Clearance System (the "ICS"), an interacting network of national, state and

local employment offices established during the great depression by the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. §§ 49-49k (Supp. 1980). To utilize the ICS, a grower must accompany its application for certification to the Regional Administrator of the Department of Labor with a job offer for domestic workers which is referred to and circulated through the ICS network for at least sixty days. The application for certification of a need for foreign labor is granted or denied, in whole or in part, depending on the number of domestic workers who accept jobs through the ICS.

The background and allegations relating to discrimination by defendants against Puerto Rican farm workers are as follows:

In furtherance of its efforts to reduce unemployment, the Commonwealth, since 1976, has attempted to refer agricultural workers to the East Coast apple growers through the ICS. These efforts have met with resistance on the part of the apple growers who have traditionally employed Jamaican workers. In 1976 and 1977 few Puerto Ricans gained employment through the ICS. It has been established that the growers were legally justified in their unwillingness to hire Puerto Ricans in those years by the existence of Public Law 87 of the Commonwealth which required mainland employers to negotiate service contracts with Puerto Ricans containing provisions more onerous on the employer than those required by federal law, and further, subjected non-complying employers to possible criminal penalties. *Hernandez Flecha, et al. v. Quiros*, 567 F.2d 1154 (1st Cir. 1977), *cert. denied*, 436 U.S. 945, 98 S.Ct. 2846 (1978). (Public Law 87 rendered Puerto Rican workers "unavailable" within the meaning of the Immigration and Nationality Act.)

In July 1978 the legislature of Puerto Rico attempted to remedy the problems which had been caused by Public Law 87 by approving an amendment which authorized

the Secretary of Labor of Puerto Rico to exempt employers from its requirements. Immediately thereafter, the Secretary of Labor of Puerto Rico, Carlos Quiros, announced his intention to exempt from Public Law 87 the apple growers whose 1978 job orders would be transmitted through the ICS. The Department of Labor, through the ICS, then cleared a total of 2,318 job orders for the East Coast apple harvest to Puerto Rico. On August 14, 1978, certification decisions were made. By that date, only two weeks after the job orders had been cleared to Puerto Rico, Secretary Quiros had already recruited 1,094 Puerto Rican workers. Certification applications of the defendant growers were denied, in whole or in part, because of the apparent availability of Puerto Rican workers to fill the 2,318 job orders.

After the certification applications were denied, but before all of the job orders were filled, a number of associations representing East Coast fruit growers filed an action in the United States District Court for the Western District of Virginia seeking an injunction ordering the Secretary of Labor to certify the unavailability of domestic workers for 1,460 jobs and ordering the Commissioner of the Immigration and Naturalization Service to issue 1,460 additional visas for Jamaican workers. The injunction was granted because it appeared unlikely that Puerto Rican workers would be available in sufficient numbers to timely begin the harvest.[2]

However, before the beginning of the harvest, Secretary Quiros successfully recruited all of the workers for whom job orders had been received through the ICS. Of the 2,318 workers recruited, 611 were assigned to work for the New York apple growers. In granting the injunction which admitted the Jamaican workers the district

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[2] *Frederick County Fruit Growers Association, Inc. v. F. Ray Marshall, et al.*, 78 Civ. 0086(H) (W.D. Va. August 31, 1978), *appeal dismissed and remanded*, 594 F.2d 857 (4th Cir. 1979).

court warned the growers that they were not relieved of their responsibility to hire those domestic workers who were present to begin the harvest. Nevertheless, the growers failed to hire many of the Puerto Ricans who had been referred to them. As a result, of those Puerto Ricans recruited only 992 left for the mainland. Flights for the remainder were cancelled following a request to Secretary Quiros by the United States Department of Labor that any further referrals be cancelled since many of the growers were refusing to employ the Puerto Rican workers who had already arrived at the orchards. Of the 386 Puerto Ricans who ultimately arrived at the New York orchards, fewer than 50 were employed to work through the 1978 harvest.

DISCUSSION

In order to present a justiciable case and controversy a litigant must possess a sufficient interest in the outcome of the action. *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703 (1962). In its capacity as *parens patriae* a state, and here, the Commonwealth,[3] may sue to "prevent or repair harm to its 'quasi-sovereign' interests." *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 258, 92 S. Ct. 885, 890 (1972).[4] A state possesses and may

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[3] As a Commonwealth of the United States, Puerto Rico may represent its citizens as *parens patriae*. *Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc., et al.*, 632 F.2d 365, 369 (4th Cir. 1980). The Department of Labor of Puerto Rico is under a statutory duty to promote the interests of laborers. 3 P.R. Laws Ann. §§ 305-06. It is in fulfillment of this obligation that the Secretary of Labor brings this action.

[4] The term *parens patriae* was traditionally used to refer to "the King's power as guardian of persons under legal disabilities to act for themselves," which function passed to the states in this country. *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 257, 92 S. Ct. 885, 888-89 (1972).

Most of the decisions dealing with the right of a state to sue as *parens patriae* have been made in the context of suits between

assert a quasi-sovereign interest in its general economy, *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S. Ct. 716 (1945), and in protecting the welfare of its citizens, *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658 (1923).[5] The asserted quasi-sovereign interests will be deemed sufficiently implicated to support *parens patriae* standing only if "the injury alleged affects

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states or by one state against a citizen of another state in which the original jurisdiction of the Supreme Court has been invoked pursuant to Article III, § 2 of the United States Constitution. Nevertheless, the basic principles of *parens patriae* standing discussed in those cases have application to suits by a state against a citizen of another state at the district court level. In order to properly invoke the original jurisdiction of the Supreme Court a state must initially prove that the lawsuit has been brought to protect state interests and not those of its individual citizens. *Maryland, et al. v. Louisiana*, 49 U.S.L.W. 4562, 4565 (U.S. S. Ct. May 26, 1981). Additional considerations are involved in a determination of whether to exercise jurisdiction in original suits. In all such suits the Court will exercise jurisdiction only when plaintiff has "established the 'strictest necessity' required for invoking [the] Court's original jurisdiction." *Maryland, et al. v. Louisiana*, 49 U.S.L.W. at 4572 (Rehnquist, J., dissenting) (quoting *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505, 91 S. Ct. 1005, 1013 (1971). Eleventh Amendment considerations are also involved in suits between states. *See e.g., New Hampshire v. Louisiana*, 108 U.S. 76, 2 S. Ct. 176 (1883).

[5] The quasi-sovereign interest first recognized was that "independent of and behind the titles of its citizens, in all the earth and air within its domain," *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S. Ct. 618, 619 (1907), which allowed states to proceed as *parens patriae* to protect their vital natural resources. *E.g., New York v. New Jersey*, 256 U.S. 296, 41 S. Ct. 492 (1921) (suit to enjoin New Jersey from directing sewage into New York Bay); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 27 S. Ct. 618 (1907) (suit to enjoin manufacturing company from discharging noxious gas over five Georgia counties); *Kansas v. Colorado*, 206 U.S. 46, 27 S. Ct. 655 (1907) (suit to enjoin the diversion of water from the Arkansas River); *Missouri v. Illinois*, 180 U.S. 208, 21 S. Ct. 331 (1901) (suit to enjoin discharge of sewage into the Mississippi).

the general population of a State in a substantial way." *Maryland, et al. v. Louisiana*, 49 U.S.L.W. 4562, 4565 (U.S. S. Ct. May 26, 1981). The general population need not be directly affected for "even where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects." *Commonwealth of Pennsylvania, by Shapp v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir.), *cert. denied*, 429 U.S. 977, 97 S. Ct. 485 (1976). Thus, in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S. Ct. 716, it was held that the state had standing to enjoin a conspiracy to fix anti-competitive rail rates. While it was the rail companies that were directly affected by the overcharges, the Supreme Court recognized that the citizens of the state indirectly suffered substantially from the alleged violation:

> Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.

324 U.S. at 451, 65 S. Ct. at 723. Similarly, in *Missouri v. Illinois*, 180 U.S. 208, 21 S. Ct. 331 (1901), where Missouri was granted leave to file a bill seeking to enjoin the discharge of sewage into the Mississippi, it was recognized that "substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state." 180 U.S. at 241, 21 S. Ct. at 344. *Accord, Kansas v. Colorado*, 206 U.S. 46, 27 S. Ct. 655 (1907).

In the instant case, all future migrant workers who might be refused employment due to the alleged unlaw-

ful discrimination, and the families of these workers, stand to be directly injured. Even if those directly injured are not substantial enough in number for their interests to be deemed "public," and therefore properly litigated by the state, *compare Maryland, et al. v. Louisiana*, 49 U.S.L.W. 4562; *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, a broader range of state interests beyond those of the workers are involved. The Commonwealth's efforts to secure the rights of migrant workers will most significantly benefit the general population whose welfare is dependent upon the health of the Puerto Rican economy.

The activities of the growers will significantly affect the economy of Puerto Rico. While the impact on the economy of the unemployed status of the workers and the care of their families is the Commonwealth's concern, the harm is more fundamental and pervasive. Puerto Rico is confronted with an average adult unemployment rate of 18.5%. For many years the Commonwealth government has attempted to alleviate unemployment by placing Puerto Rican workers in jobs on the mainland. In the period of 30 years prior to 1978, 350,000 Puerto Rican workers were placed in agricultural and non-agricultural jobs on the mainland. In 1978, 3,967 workers were actually placed in agricultural jobs outside the apple industry.[6] The figures reflect the importance of migrant labor to the economy of Puerto Rico. The Fourth Circuit described the injury resulting from discrimination against Puerto Rican workers as follows:

> The number of farm workers temporarily employed annually [by the defendants] does not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens. The island's officials are coping with an almost unman-

[6] Affidavit of Manuel Rodriguez Escalara, Assistant Director, Migration Division, Department of Labor (March 21, 1979).

> ageable unemployment problem. Its economy is in dire straits. The morale of the average Puerto Rican citizen under the circumstances can be expected to be extremely low. Deliberate efforts to stigmatize the labor force as inferior carry a universal sting.
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> . . . The apparent inability of the United States government, through the Department of Labor, to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers must certainly have an effect which permeates the entire island of Puerto Rico. Residual injuries to the Commonwealth effort are, to say the least, very serious.

Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d at 370. A statewide conspiracy to discriminate against Puerto Ricans by apple growers who except for such discrimination would have employed a significant number of Puerto Rican laborers will adversely affect the continuing effort of the Commonwealth to secure work for its citizens.

A final factor to consider in determining whether to allow a state to proceed as *parens patriae* is "the presence or absence of a more appropriate party or parties capable of bringing suit." *Commonwealth of Pennsylvania, by Shapp v. Kleppe*, 533 F.2d at 675. While this consideration is derived from the traditional concept of *parens patriae*, that is, the King's power as guardian of persons under legal disability to act for themselves, a state seeking to proceed as *parens patriae* need not demonstrate the inability of private persons to obtain relief if *parens patriae* standing is otherwise indicated. *See, e.g., Maryland et al. v. Louisiana*, 49 U.S.L.W. 4562; *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S. Ct. 716. Rather, "[t]he arguments in favor of allowing such standing become less compelling, as it becomes more feasible to achieve complete relief through suits by the parties actually aggrieved." *Commonwealth*

of Pennsylvania, by Shapp v. Kleppe, 533 F.2d at 675 n.42. In this case, it is unlikely that the individual Puerto Ricans who were injured by the alleged discrimination in 1978 will achieve the complete relief sought by the Commonwealth. First, the individual workers are separated from the mainland, which would make litigation of the individual claims difficult and costly. There is no assurance that the individual workers could bear the cost of a lawsuit that would achieve complete relief. Moreover, the interests of the individual laborers who were deprived of employment in 1978 are not necessarily coextensive with those of the public which the Commonwealth represents. Thus, even if the workers could marshal the resources to institute and effectively prosecute actions or a class action in their own behalf, there is no assurance that all named defendants herein would be sued or that relief against widespread and future discrimination would be actively pursued.[7] The vindication of the rights of all future migrant laborers and the public of Puerto Rico should not be made dependent upon the possible relief obtained by the individual workers.[8]

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[7] Shortly after this action was dismissed by the district court a class action suit was filed on behalf of mainland and Puerto Rican migrant workers against certain New York apple growers. The suit was brought in part by 13 Puerto Rican workers involved in the 1978 harvest who seek damages and injunctive relief against some of the same defendant apple growers sued by the Commonwealth in this case. *Juan Valderrama Rios, et al. v. Secretary of Labor F. Ray Marshall, et al.*, No. 79 Civ. 5711 (S.D.N.Y. October 22, 1979).

[8] We also note that the Commonwealth in this case seeks injunctive relief only. Therefore, even if the individual workers were successful in recovering damages from some or all of the growers there would be no possibility of double recovery in damages. Such a possibility would weigh against a finding of *parens patriae* standing. *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. at 261-62, 92 S. Ct. at 891.

Accordingly, we believe that the Commonwealth of Puerto Rico has standing as *parens patriae* to litigate this action. The decision of the district court is reversed and the cause is remanded for further proceedings.

APPENDIX D

STATUTORY PROVISIONS

Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (a)(15)(H):

(a) As used in this chapter—

* * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * *

(H) An alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

Immigration and Nationality Act of 1952, 8 U.S.C. § 1184(c):

(c) The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as

the Attorney General shall prescribe. The approval of such petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

REGULATIONS

Temporary Labor Certification Process Regulations, 20 C.F.R. Part 655 (1978):

§ 655.0 Scope and purpose of Part.

(a) *General.* This part sets out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (1) whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (2) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required by the Attorney General, acting through the Immigration and Naturalization Service (INS) of the Department of Justice, to assist the Attorney General to carry out the policy of the Immigration and Nationality Act (INA), as implemented in the INS regulation at 8 CFR 214.2(h)(3(i), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. worker.

(b) *The statutory standard.* The Immigration and Nationality Act (the Act) (8 U.S.C. 1101 et seq.) regulates the admission of immigrant and non-immigrant aliens into the United States, Section 1101(a)(15)(H)(ii), 8 U.S.C., defines "nonimmigrant aliens" as follows:

(a) As used in this chapter

* * * *

(5) The term "immigrant" means an alien except an alien who is within one of the following classes of nonimmigrant aliens—

(H) An alien having residence in a foreign country which he has no intention of abandoning.

* * * *

(ii) Who is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

The basis for the admission of nonimmigrant aliens into the United States is set by section 1184(a), 8 U.S.C. which provides in pertinent part:

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may be regulations prescribed***

Section 1184(c), 8 U.S.C., directs the Attorney General to consult with "appropriate agencies of the Government" prior to determination on the petition of an employer for the importation of temporary nonimmigrant alien workers:

(c) The question of importing any alien as a nonimmigrant under section 1107(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such

a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

(c) *The INS regulations.* The Attorney General, through the Immigration and Naturalization Service (INS), has promulgated regulations to implement the Attorney General's responsibilities regarding the admission of temporary foreign workers. These regulations, which are codified at 8 CFR 214.2(h)(3), adopt the same admission standards for nonimmigrant temporary foreign workers that the INA (8 U.S.C. 1182(a)(14)(A) and (B)) requires for certain immigrants who seek to perform permanent work in the United States. They also provide employers the right to an adjudicatory review before the INS whenever the Secretary has advised the INS that one or both of the factual determinations cannot be made, 8 CFR 214.2(h)(3)(i) requires:

[A] certification from the Secretary of labor stating that qualified persons in the United States are not available (see 8 U.S.C. 1182(a)(14)(A)) and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed (see 8 U.S.C. 1182(a)(14)(B)) or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 10(a)(a)(15)(H)(ii) of the Act. If there is attached to the petition a notice from the Secretary of Labor that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

Under the authority of the INA and the INS regulations the Secretary of Labor has promulgated the regula-

tions in this part. They set forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers. They provide the Secretary's methodology for the two-fold determination of availability of domestic workers for, and of any adverse effect which would be occasioned by, the use of foreign workers for particular temporary jobs in the United States.

(d) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery*, 531 F.2d 299 (5th Cir. 1976).

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.

(e) *Construction.* This part and its subparts shall be construed to effectuate the purpose of the INA that U.S.

workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974), *Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc. v. Usery*, 531 F.2d 299 (5th Cir. 1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

§ 655.00 Authority of the Regional Administrator.

Pursuant to the regulations under this part, temporary labor certification determinations are ordinarily made by the Regional Administrator of an Employment and Training Administration region. The Administrator, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by, the United States Employment Service (USES) in Washington, D.C. In those cases the Regional Administrator will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

Subpart C—Labor Certification Process for Temporary Agricultural and Logging Employment

§ 655.200 General Description of this subpart and definition of terms.

(a) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with a local office of a State employment service agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time

is allowed for the 60-day recruitment period required by the regulations and a determination by the Regional Administrator (RA) as to the availability of U.S. workers 20 days before the date of need. Shortly after the application has been filed, the RA makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and working conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working condition standards, the RA shall deny the temporary labor certification application and offer the employer an administrative judicial review of the denial by a Department of Labor Hearing Officer. If the application is not timely, the RA has discretion, as set forth in these regulations, to either deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as will accomplish the purposes of the INA and the INS regulations. Where the application is timely and meets the regulatory standards, the State employment service agency, the employer, and the Department of Labor recruit U.S. workers for 60 days. At the end of the 60 days, the RA grants the temporary labor certification if the RA finds that (1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities. If the temporary labor certification is denied, the employer may seek an administrative-judicial review of the denial by a Department of Labor Hearing Officer as provided in these regulations. The Department of Labor thereafter advises the Immigration and Naturalization Service (INS) of approvals and denials of temporary labor certifications. The INS may accept or reject this advice.

8 CFR 214.2(h)(3). The INS makes the final decision as to whether or not to grant visas to the foreign workers. 8 U.S.C. 1184(a).

(b) *Definitions for terms used in this subpart.* "Administrator" means the chief official of the United States Employment Service or the Administrator's designee.

"Adverse effect rate" means the wage rate which the Administrator has determined must be offered and paid to foreign and U.S. workers for a particular occupation and/or area so that the wages of similarly employed U.S. workers will not be adversely affected. The Administrator may determine that the prevailing wage rate in the area and/or occupation is the adverse effect rate, if the use (or non-use) of aliens has not depressed the wages of similarly employed U.S. workers. The Administrator may determine that a wage rate higher than the prevailing wage rate is the adverse effect rate if the Administrator determines that the use of aliens has depressed the wages of similarly employed U.S. workers.

"Agent" means a legal person, such as an association of employers, which (1) is authorized to act as an agent of the employer for temporary labor certification purposes, and (2) which is not itself an employer, or a joint employer, as defined in this section.

"Area of intended employment" means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

"Employer" means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to

employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employees. An association of employers shall be considered an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if it shares with the employer member one or more of the definitional indicia.

"Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

"Hearing Officer" means a Department of Labor official, whether Administrative Law Judge or Hearing Officer, who is authorized to conduct administrative hearings.

"Immigration and Naturalization Service (INS)" means the component of the U.S. Department of Justice which makes the determination under the Immigration and Nationality Act (INA) on whether or not to grant a visa to an alien seeking to perform temporary agricultural or logging work in the United States.

"Job opportunity" means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

"Local office" means an office of a State employment service agency which serves a particular geographic area within a State.

"Regional Administrator, Employment and Training Administration (RA)" means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

"Secretary" means the Secretary of Labor or the Secretary's designee.

"State agency" means the State employment service agency.

"Temporary labor certification" means the advice given by the Secretary of Labor to the Immigration and Naturalization Service, pursuant to the regulations of that agency at 8 CFR 214.2(h)(3)(i), that (1) there are not sufficient U.S. workers who are qualified and available to perform the work and (2) the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

"United States Employment Service (USES)" means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act of 1933, which is charged with administering the national system of public employment offices and carrying out the functions of the Secretary under the Immigration and Nationality Act.

"United States workers" means any worker who, whether U.S. national, citizen or alien, is legally permitted to work permanently within the United States.

§ 655.201 Temporary labor certification applications.

(a)(1) An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification for temporary foreign workers by filing, or by having an agent file, in duplicate, a temporary labor certification application, signed by the employer, with a local office in the area of intended employment.

(2) If the temporary labor certification application is filed by an agent, however, the agent may sign the application if the application is accompanied by a letter from each employer the agent represent, signed by the employer, which authorizes the agent to act on the employ-

er's behalf and which states that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for the fulfillment of all legal requirements arising under this subpart.

(3) If an association of employers files the application, the association shall identify and submit documents to verify whether, in accordance with the definitions at § 655.200, it is (i) the employer, (ii) a joint employer with its member employers, or (iii) the agent of its employer members.

(b) Every temporary labor certification application shall include:

(1) A copy of the job offer which will be used by the employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of § 655.202 and § 658.108 of this chapter;

(2) The assurances required by § 655.203; and

(3) The specific estimated date of need of workers.

(c) The entire temporary labor certification application shall be filed with the local office in duplicate and in sufficient time to allow the State agency to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system for 60 calendar days prior to the estimated date of need. Section 655.206 requires the RA to grant or deny the temporary labor certification application by the end of the 60 calendar days, or 20 days from the estimated date of need, whichever is later. That section also requires the RA to offer employers an expedited administrative-judicial. Finally, employers need time, after the temporary

labor certification applications. Following an administrative-judicial review, the employer has a right to contest any denial before the INS pursuant to 8 CFR 214.2(h)(3)(i). Finally, employers need time, after the temporary labor certification determination, to complete the process for bringing foreign workers into the United States, or to bring an appeal of a denial of an application for the labor certification. Therefore, employers should file their temporary labor certification applications at least 80 days before the estimated date of need specified in the application.

(d) Applications may be amended at any time prior to RA determination to increase the number of workers requested in the original application for labor certification by not more than 15 percent without requiring an additional recruitment period for U.S. workers. Requests for increases beyond 15 percent may be approved only when it is determined that, based on past experience, the need for additional workers could not be foreseen and that a critical need for the workers would exist prior to the expiration of an additional recruitment period.

(e) If a temporary labor certification application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the local office shall immediately send both copies directly to the appropriate Regional Administrator (RA). The RA may then advise the employer and the INS in writing that the temporary labor certification cannot be granted because, pursuant to the regulations at paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial to the employer shall inform the employer of the right to administrative-judicial review and to ultimately petition INS for the admission of the aliens. In emergency situ-

ations, however, the RA must waive the time period specified in this section on behalf of employers who have not made use of temporary alien workers for the prior year's harvest or for other good and substantial cause, provided the RA has sufficient labor market information to make the labor certification determinations required by 8 CFR 214.2(h)(3)(i).

§ 655.202 Contents of job offers.

(a) So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers. For example, if the employer intends to advance transportation costs to foreign workers either directly or indirectly (by having them paid by the foreign government involved), the employer must offer to advance the transportation costs of U.S. workers.

(b) Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, the Administrator has determined that, in order to protect similarly employed U.S. workers from adverse effect with respect to wages and working conditions, every job offer for U.S. workers must always include the following minimal benefit, wage, and working condition provisions:

(1) The employer will provide the worker with housing without charge to the worker. The housing will meet the full set of Department of Labor, Occupational Safety and Health Administration standards set forth at 29 CFR1910.142 (or the full set of standards of 20 CFR

Part 620, if applicable. See the FEDERAL REGISTER of December 9, 1977, for applicability criteria), except that range housing for sheepherders shall meet guidelines which shall be issued periodically by the Department. When it is the prevailing practice in the area of intended employment to provide family housing, the employer will provide such housing to such workers;

(2) (i) If the job opportunity is covered by the State workers' compensation law, the worker will be eligible for workers' compensation for injury and disease arising out of and in the course of worker's employment; or

(ii) If the job opportunity is not covered by the State workers' compensation law, the employer will provide at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment;

(3) The employer will provide without cost to the worker all tools, supplies and equipment required to perform the duties assigned and, if any of these items are provided by the worker, the employer will reimburse the worker for the cost of those so provided;

(4) The employer will provide the worker with three meals a day. The job offer shall state the cost to the worker for such meals. The cost shall not be more than $3.25 per day unless the RA has approved a higher cost pursuant to § 655.211.

(5) (i) The employer will provide or pay for the worker's transportation and daily subsistence from the place, from which the worker, without intervening employment, will come to work for the employer, to the place of employment, subject to the deductions allowed by paragraph (b) (13) of this section. The amount of the daily subsistence payment shall be at least as much as the amount

the employer will charge the worker with three meals a day during employment;

(ii) If the worker completes the work contract period, the employer will provide or pay for the worker's transportation and daily subsistence from the place of employment to the place, from which the worker, without intervening employment, came to work for the employer, unless the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite; and

(iii) The employer will provide transportation between the worker's living quarters and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations;

(6) (i) The employer guarantees to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the termination date specified in the work contract, or in its extensions if any. For purposes of this paragraph, a workday shall mean any period consisting of 8 hours of work time. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays. The work must be offered for at least three-fourths of the 8 hour workdays. (That is, ¾ x (number of days x 8 hours)) Therefore, if, for example, the contract contains 20 workdays, the worker must be offered employment for 120 hours during the 20 workdays. A worker may be offered more than 8 hours of work on a single workday. For purposes of meeting the guarantee, however, the worker may not be

required to work for more than 8 hours per workday, or on the worker's Sabbath or Federal holidays;

(ii) If the worker will be paid on a piece rate basis, the employer will use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iii) Any hours which the worker fails to work when the worker has been offered an opportunity to do so pursuant to paragraph (b) (6) (i) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday, or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met;

(7) (i) The employer will keep accurate and adequate records with respect to the workers' earnings, including field tally records, supporting summary payroll records, and records showing: The nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with, and over and above, the guarantee); the hours actually worked each day by the worker; this time the worker began and ended each workday; the rate of pay; the workers' earnings per pay period; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the guarantee, the records will state the reason or reasons therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by representatives of the Secretary of Labor, and by the worker and the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(8) The employer will furnish to the worker at or before each payday, in one or more written statements:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily;

(9) (i) If the worker will be paid by the hour, the employer will pay the worker at least the adverse effect rate; or

(ii) If the worker will be paid on a piece rate basis, the piece rate will be designed to produce average hourly earnings at least equal to the adverse effect rate. If the piece rate does not result at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the worker's pay will be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the adverse effect rate;

(10) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least biweekly whichever is more frequent);

(11) If the worker voluntarily abandons employment before the end of the contract period, or is terminated

for cause, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section;

(12) If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire or other Act of God which makes the fulfillment of the contract impossible, and the RA so certifies, the employer may terminate the work contract. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the worker (i) will be returned to the place from which the worker, without intervening employment, came to work for the employer at the employer's expense; and

(ii) Will be reimbursed the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment borne directly or indirectly by the employer;

(13) The employer will make those deductions from the worker's paycheck which are required by law. The job offers shall specify all deductions, not required by law, which the employer will make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer; in such cases, however, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period; and

(14) The employer will provide the worker a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section.

§ 655.203 Assurances.

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that:

(a) The job opportunity is not:

(1) Vacant because the former occupant is on strike or being locked out in the course of a labor dispute; or

(2) At issue in a labor dispute involving a work stoppage;

(b) During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State and local employment-related laws, including employment related health and safety laws;

(c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;

(d) The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employer's place of employment by;

(1) Allowing the employment service system to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at

least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid for by the employer;

(ii) Each advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the employment service system in contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;

(4) Cooperating with the employment service system in contacting schools, business and labor organization, fraternal and veterans organizations, and non-profit organizations and public agencies such as sponsors of programs under the Comprehensive Employment and Training Act, throughout the area of intended employment, in order to enlist them in helping to find U.S. workers; and

(5) If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the Government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, making the same kind and degree of efforts to secure U.S. workers;

(e) From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide housing, and the other benefits, wages, and working conditions required by § 655.202, to any such U.S. worker; and

(f) Performing the other specific recruitment activities specified in the notice from the RA required by § 655.205(a).

§ 655.204 Determinations based on temporary labor certification applications.

(a) Within two working days after the temporary labor certification application has been filed with it, the local office shall mail the duplicate application directly to the appropriate RA.

(b) The local office, using the job offer portion of its copy of the temporary labor certification application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment.

(c) The RA, upon receipt of the duplicate temporary labor certification application, shall promptly review the application to determine whether it meets the requirements of §§ 655.201-655.203 in order to determine whether the employer's application is (1) timely, and (2) contains offers of wages, benefits, and working conditions required to ensure that similarly employed U.S. workers will not be adversely affected. If the RA determines that the temporary labor certification application is not timely in accordance with § 655.201 of this subpart, the RA may promptly deny the temporary labor certification on the grounds that, in accordance with that regulation, there is not sufficient time to adequately test the availability of U.S. workers. If the RA determines that the application does not meet the requirements of §§ 655.202-655.203 because the wages, working conditions, benefits, assurances, job offer, etc. are not as required, the RA shall deny the certification on the grounds that the availability of U.S. workers cannot be adequately tested because the wages or benefits, etc. do not meet the adverse effect criteria.

(d) If the certification is denied, the RA shall notify the employer in writing of the determination, with a

copy to the local office and the Administrator. The notice shall:

(1) State the reasons for the denial citing the relevant regulations; and

(2) Offer the employer an opportunity to request an expedited administrative-judicial review of the denial by a Department of Labor (DOL) Hearing Officer. The notice shall state that, in order to obtain such a review, the employer must, within five calendar days of the date of the notice, telegraph a written request for such a review to the Chief Administrative Law Judge of the Department of Labor (giving the address) and to the Regional Administrator. The notice shall also state that the employer's request fo review should contain any legal arguments which the employer believes will rebut the basis of the RA's denial of certification; and

(3) State that, if the employer does not request an expedited administrative-judicial review before a DOL Hearing Officer within the five days:

(i) The RA will advise the INS that the certification cannot be granted, giving the reasons therefor, and that an administrative-judicial review of the denial was offered to the employer but not accepted, and enclosing, for INS review, the entire temporary labor certification application file; and

(ii) The employer has the opportunity to submit evidence to the INS to rebut the bases of the RA's determination in accordance with the INS regulation at 8 CFR 214.2(h)(3)(i) but that no further review of the employer's application for temporary labor certification may be made by any Department of Labor official.

(e) If the employer timely requests an expedited administrative-judicial review pursuant to paragraph (d)(2) of this section, the procedures of § 655.212 shall be followed.

§ 655.205 Recruitment period.

(a) If the RA determines that the temporary labor certification application meets the requirements of §§ 655.201-655.203, the RA shall promptly notify the employer in writing, with copies to the State agency and local office. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.203 with respect to the recruitment of U.S. workers. The notice shall require that the job order be placed both into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers.

(b) Thereafter, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) By the 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.203. If the RA concludes that the employer has not satisfied the requirement for recruitment of U.S. workers, the RA shall deny the temporary labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in § 655.212 shall be followed.

(d) If the employer timely requests an expedited administrative-judicial review before a DOL Hearing Officer, the procedures in § 655.212 shall be followed.

§ 655.206 Determinations of U.S. worker availability and adverse effect on U.S. workers.

(a) If the RA, in accordance with § 655.205 has determined that the employer has complied with the recruitment assurances, the RA, by 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, shall grant the temporary labor certification for enough aliens to fill the employer's job opportunities for which U.S. workers are not available. In making this determination the RA shall consider as available for a job opportunity any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads; such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are very likely to sign such a work contract. The RA shall also count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons unless the RA determines that:

(1) Enough qualified U.S. workers have been found to fill all the employer's job opportunities; or

(2) The employer, since the time of the initial determination under § 655.204, has adversely affected U.S. workers by offering to, or agreeing to provide to, alien workers better wages, working conditions, or benefits (or by offering or agreeing to impose on alien workers less obligations and restrictions) than that offered to U.S. workers.

(b) (1) Temporary labor certifications shall be considered subject to the conditions and assurances made during the application process. Temporary labor cer-

tifications shall be for a limited duration such as for "the 1978 apple harvest season" or "until November 1, 1978", and they shall never be for more than eleven months. They shall be limited to the employer's specific job opportunities; therefore, they may not be transferred from one employer to another.

(2) If an association of employers is itself the employer, as defined in § 655.200, certifications shall be made to the association and may be used for any of the job opportunities of its employer members and workers may be transferred among employer members.

(3) If an association of employers is a joint employer with its employer members, as defined in § 655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

(c) If the RA denies the temporary labor certification in whole or part, the RA shall notify the employer in writing, and by telegram. The notice shall contain all of the statements required in § 655.204(d). If a timely request is made for an administrative-judicial review by a DOL Hearing Officer, the procedures of § 655.212 shall be followed.

(d) (1) After a temporary labor certification has been granted, the employer shall continue its efforts to actively recruit U.S. workers until the foreign workers have departed for the employer's place of employment. The employer, however, must keep an active job order on file until the assurance at § 655.203(e) is met.

(2) The ES system shall continue to actively recruit and refer U.S. workers as long as there is an active job order on file.

§ 655.207 Adverse effect rates.

(a) Except as otherwise provided in this section, the adverse effect rates for all agricultural and logging employment shall be the prevailing wage rates in the area of intended employment.

(b)(1) For agricultural employment in the States listed in paragraph (b)(2) of this section, and for Florida sugar cane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate by the percentage change (from the second year previous to the prior year) in the Department of Agriculture farm wage rates for agricultural workers. The Administrator shall annually publish adverse effect rates calculated pursuant to this paragraph as a notice in the FEDERAL REGISTER.

(2) *List of States.* Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Maryland, Virginia, and West Virginia. Other States may be added as appropriate.

(c) In any year in which the applicable adverse effect rate is increased, employers shall adjust their piece rates upward to avoid requiring a worker to increase his or her productivity over the previous year in order to earn an amount equal to what the worker would earn if the worker were paid at the adverse effect rate.

(d) The Administrator may periodically publish adverse effect piece rates for selected occupations. If the Administrator decides to do so, the methodology for establishing such piece rates shall be published as proposed rulemaking as an amendment to this section. The methodology shall take into account the changes in adverse effect rates. After the methodology is published as final rulemaking, the Administrator may publish adverse effect piece rates, calculated pursuant to the methodology, by notice in the FEDERAL REGISTER.

§ 655.208 Temporary labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a temporary labor certification application is discovered prior to a final temporary labor certification determination, or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the RA shall refer the matter to the INS for investigation and shall notify the employer or agent in writing of this referral. The RA shall continue to process the application and may issue a qualified temporary labor certification.

(b) If a court finds an employer or agent innocent of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary labor certification application, the application shall be deemed invalidated, processing shall be terminated, and the application shall be returned to the employer or agent with the reasons therefor stated in writing.

§ 655.209 Invalidation of temporary labor certifications.

After issuance, temporary labor certifications are subject to invalidation by the INS upon a determination made in accordance with that agency's procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the temporary labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Ad-

ministrator, the Regional Administrator or Administrator as appropriate, shall notify the INS in writing.

§ 655.210 Failure of employers to comply with the terms of a temporary labor certification.

(a) If, after the granting of a temporary labor certification, the RA has probable cause to believe that an employer has not lived up to the terms of the temporary labor certification, the RA shall investigate the matter. If the RA concludes that the employer has not complied with the terms of the labor certification, the RA may notify the employer that it will not be eligible to apply for a temporary labor certification in the coming year. The notice shall be in writing, shall state the reasons for the determination, and shall offer the employer an opportunity to request a hearing within 30 days of the date of the notice. If the employer requests a hearing within the 30-day period, the RA shall follow the procedures set forth at § 658.421(i)(1), (2) and (3) of this chapter. The procedures contained in § 658.421(j), 658.422 and 658.423 of this chapter shall apply to such hearings.

(b) No other penalty shall be imposed by the employment service on such an employer other than as set forth in paragraph (a) of this section.

§ 655.211 Petitions for higher meal charges.

(a) An RA may permit an employer to charge workers up to $4 for providing them with 3 meals per day if the employer justifies the charge by submitting documentary evidence to the RA. A denial in whole or in part shall be reviewable as provided in § 655.212.

(b) Evidence submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included:

Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operations; other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the Secretary's representatives for a period of one year.

§ 655.212 Administrative-judicial reviews.

(a) Whenever an employer has requested an administrative-judicial review of a denial of an application or petition in accordance with §§ 655.204(d), 655.205(d), 655.206(c), or 655.211 by telegram, the Chief Administrative Law Judge shall immediately assign a Hearing Officer to review the record for legal sufficiency, and the Regional Administrator shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next day delivery. The Hearing Officer shall not have authority to remand the case and shall not receive additional evidence. Any contervailing evidence advanced after decision by the Regional Administrator shall be subject to provisions of 8 CFR 214.2(h)(3)(i).

(b) The Hearing Officer, within five working days after receipt of the case file shall, on the basis of the written record and due consideration of any written memorandums of law submitted, either affirm, reverse or modify the RA's denial by written decision. The decision of the Hearing Officer shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, Administrator, and INS by telegram or hand delivery. The Hearing Officer's decision shall be the final decision of the Department of Labor and no further review shall be given to the temporary labor certification determination by any Department of Labor official.

APPENDIX E

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF LABOR AND
HUMAN RESOURCES
BUREAU OF EMPLOYMENT SECURITY
HATO REY, PUERTO RICO

OFFICE OF THE DIRECTOR

April 7, 1980

Mr. James A. Ware
Regional Administrator
U.S. Department of Labor
Employment and Training Administration
1515 Broadway
New York, New York 10036

Attention: Mr. Ken Hamlett

Dear Mr. Ware:

This is in relation to a complaint filed by Mr. Juan Valderrama, SS# 583-43-6006, against employer Altamont Farm, Inc., Milton, N.Y., pursuant to the 1978 apple harvest.

Mr. Valderrama is not satisfied with the decision taken by the Department of Labor of the State of New York in the resolution of his complaint. He wishes to appeal this decision and has requested us to act on his behalf.

With this appeal we include copy of the Opinion and Sentence issued by a Superior Court of Puerto Rico as a result of a lawsuit filed against Altamont Farms, Inc. by Nelly Rios, et al., among which is Mr. Juan Valderrama (Civil Number 78-6106 (901)—San Juan Superior Court).

The above mentioned resolution appears to be in direct conflict with the conclusions reached by the New York

Department of Labor in Mr. Valderrama's as well as in other complaints filed against Altamont Farms, Inc.

Thank you for your attention to this matter.

Sincerely,

/s/ Leandro L. Peña
LEANDRO L. PENA
Director

Enclosures

Opposition

Office-Supreme Court, U.S.
FILED
SEP 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOUIS BRAMKAMP, *et al.*,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO on the relation of PEDRO BAREZ, SECRETARY, DEPARTMENT OF LABOR AND HUMAN RESOURCES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May the Commonwealth of Puerto Rico sue as *parens patriae* for declaratory and injunctive relief against the violation by New York apple growers of a pervasive federal statutory and regulatory scheme which mandates that available domestic workers be given preference over foreign labor in temporary agricultural employment where: (1) the Commonwealth, which in 1978 suffered from 23% rural unemployment, has attempted since 1975 to place its unemployed farm workers in apple picking jobs with the petitioner growers; (2) the petitioners continue to accord preference to Jamaican workers over Puerto Rican workers; (3) the petitioners have engaged in coordinated, industry-wide resistance to the employment of Puerto Rican workers in apple picking jobs; and (4) only the Commonwealth is capable of securing comprehensive relief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-361

LOUIS BRAMKAMP, *et al.*,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO on the relation of PEDRO BAREZ, SECRETARY, DEPARTMENT OF LABOR AND HUMAN RESOURCES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Commonwealth of Puerto Rico respectfully prays that the Court deny the requested writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 28, 1981.

DECISIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Respondent is satisfied with these sections as they appear in the Petition for Writ of Certiorari at pp. 1-2.

STATEMENT OF THE CASE

This litigation is but one chapter in a controversy over the hiring of Puerto Rican agricultural workers for the annual apple harvest in East Coast states. At the heart of

the controversy is the federally guaranteed right of Puerto Ricans, as U.S. citizens, to a preference over alien labor in the annual competition for temporary agricultural work. It is the denial of that right which the Commonwealth sues to redress.

The Immigration and Nationality Act of 1952, 8 U.S.C. §1101 *et seq.* ("INA"), permits the admission of aliens for the purpose of performing temporary agricultural work only "if unemployed persons capable of performing such service or labor cannot be found in this country. . . ." 8 U.S.C. §1101(a)(15)(H)(ii). The policy of Congress, as expressed in the INA, is that U.S. workers — rather than aliens — be employed wherever possible. *See, e.g., Elton Orchards, Inc.* v. *Brennan,* 508 F.2d 493, 500 (1st Cir. 1974). Pursuant to this policy, Immigration and Naturalization Service ("INS") regulations require that an employer's petition for the admission of nonimmigrant aliens be accompanied by a certification from the U.S. Secretary of Labor that U.S. workers are not available to do the work. 8 C.F.R. § 214.2(h)(3).

The Secretary of Labor tests the availability of domestic workers by transmitting employers' job offers through the Interstate Clearance System ("ICS"), a network originally established by the Wagner-Peyser Act of 1933, 29 U.S.C. §§ 49-49k, to facilitate the flow of laborers from supply states to demand states during the Great Depression. The Puerto Rico Employment Service, an agency of the Commonwealth Department of Labor ("PRDOL"), has for decades played an active and successful role in alleviating unemployment in Puerto Rico by referring workers through the ICS to agricultural work on the mainland.

A rising level of unemployment in Puerto Rico prompted the Commonwealth Government to attempt in

1975 to refer unemployed agricultural workers through the ICS to East Coast orchards which had traditionally employed nonimmigrant Jamaican workers in the apple harvest. First Amended Complaint (hereinafter "Complaint"), par. 65. In 1975 and each succeeding year, the apple industry has engaged in concerted resistance to Puerto Rican workers, favoring instead its traditional Jamaican labor force, and has rendered the Commonwealth's efforts largely unsuccessful. In 1976, despite extensive negotiations between representatives of East Coast growers and PRDOL which resulted in an agreement to hire 1000 Puerto Rican workers, the growers hired only 613 workers and dismissed the majority of these almost immediately for alleged unproductivity. In 1977, the growers refused to negotiate at all with PRDOL. Only 93 Puerto Rican workers found jobs in the apple harvest, and the majority of these were also dismissed within a short period of time for alleged unproductivity. Complaint, par. 65.

In all three years — 1975, 1976 and 1977 — the growers relied chiefly on the existence of Puerto Rico Public Law 87 ("P.L. 87"), 29 L.P.R.A. § 526 *et seq.* (1966), as amended, to justify their resistance to hiring Puerto Rican workers. This law, enacted originally in 1947 for the purpose of protecting Puerto Rican migrant farm workers employed off-island, requires mainland employers to negotiate a contract for the services of these workers. The apple growers objected to various mandatory contract conditions — such as health insurance benefits and three hot meals a day — as "onerous" and "burdensome," and took the position that Puerto Rican workers who insisted on benefits beyond the minimum federal conditions were not "available" U.S. workers within the meaning of the INA. This position was upheld in subsequent litigation. *Galan* v. *Dunlop*, 411 F. Supp. 268

(D.D.C. 1975), *appeals dismissed and remanded* 511 F.2d 467 (D.C. Cir. 1977) (unpublished); *Hernandez Flecha* v. *Quiros,* 567 F.2d 1154 (1st Cir. 1977), *cert. denied sub nom. Hernandez Flecha* v. *Marshall,* 436 U.S. 945 (1978).

Following the *Hernandez Flecha* decision, the legislature of Puerto Rico recognized that P.L. 87 was not serving its intended purpose to advance the interests of Puerto Rican workers, but was instead being used to bar their employment in the annual East Coast apple harvest. Accordingly, in July of 1978 the legislature amended P.L. 87 specifically to remove this barrier. The amendment authorized the Commonwealth Secretary of Labor to exempt prospective employers from the requirement of negotiating a contract for the services of the workers if the employers' job offers complied with federal requirements.[1] In the preamble to this amendment, the Commonwealth legislature declared:

> At present, there is a great mass of potential workers available and willing to obtain lucrative employment. In view of this situation, it is important for reasons of public policy to seek a solution that will allow adequate channeling of the aspirations and needs of these persons to obtain a job, without needlessly harming the workers' interest in obtaining the maximum protection available.

The legislature was therefore willing, in appropriate circumstances, to rely on federal law as the primary constraint on employer conduct.

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[1] Labor Certification Process regulations issued by the U.S. Department of Labor under the INA and the Wagner-Peyser Act require certain minimal benefit, wage, and working condition provisions to be included in all job offers transmitted through the ICS. 20 C.F.R. § 655.202 (1978). These federally mandated minimum conditions become the terms of the contract between the employer and the worker.

Immediately following the effective date of this amendment, then-Labor Secretary Quiros announced his intention to exempt from the contract requirements of P.L. 87 those apple growers whose 1978 job offers met federal requirements and were transmitted through the ICS. Thereafter, USDOL cleared 2318 job offers to Puerto Rico. Over 1000 Puerto Rican workers were recruited by the week of August 14, 1978, and more than enough workers were subsequently recruited before the start of the harvest season to fill the total number of job offers received in Puerto Rico. Complaint, pars. 67 and 68.

Faced with the prospect that a large number of Puerto Rican workers would be referred to jobs in the apple harvest and with the corollary prospect that fewer Jamaican workers could be imported, growers and grower associations from Virginia, New York, Maryland and West Virginia filed an action in the U.S. District Court for the Western District of Virginia seeking to have the Puerto Rican workers once more declared "unavailable." *Frederick County Fruit Growers Association, Inc., et al.* v. *F. Ray Marshall, et al.*, No. 78-0086 (W.D. Va., complaint filed August 31, 1978), *appeals dismissed and remanded* 594 F.2d 857 (4th Cir. 1979) (unpublished), *dismissed as moot* (W.D. Va., June 16, 1980) (unpublished). Although satisfied that Puerto Rican workers were "available" within the meaning of the INA, the district court (Turk, Ch. J.) nevertheless granted an injunction forcing the issuance of nonimmigrant visas for alien laborers in the full number requested by the grower plaintiffs.

Puerto Rican workers thereafter arriving at the orchard gates suffered refusals to hire and early dismissals on a massive scale. Only 992 of the 2318 workers recruited even arrived on the mainland. The flights of the remainder were cancelled because growers were refusing to hire those who had already arrived. Fewer than 50

Puerto Ricans remained employed by New York orchards three weeks into the harvest season. Complaint, par. 68.

The Commonwealth, confronted again with widespread and concerted resistance to the employment of its citizens, filed the instant action for declaratory and injunctive relief against 55 apple industry defendants on January 12, 1979, in the U.S. District Court for the Southern District of New York. On the preceding day, January 11, 1979, a companion action was instituted against 49 industry defendants in the U.S. District Court for the Western District of Virginia. *Commonwealth of Puerto Rico ex rel. Carlos S. Quiros* v. *Alfred L. Snapp & Son, Inc., et al.*, No. 79-0007 (H). Identical motions to dismiss were filed by the defendants in both actions.

On April 19, 1979, Chief Judge James Turk of the Western District of Virginia dismissed the Commonwealth's complaint in the *Snapp* case for want of *parens patriae* standing. *Commonwealth of Puerto Rico ex rel. Quiros* v. *Alfred L. Snapp & Son, Inc.*, 469 F.Supp. 928 (W.D. Va. 1979). Five months later, Judge Kevin T. Duffy of the U.S. District Court for the Southern District of New York, in a one-sentence memorandum endorsement, dismissed the Commonwealth's complaint in this case "for the reasons stated in the decision of Judge James Turk."

On October 9, 1980, the U.S. Court of Appeals for the Fourth Circuit reversed Judge Turk and held that the Commonwealth possesses standing to pursue this litigation as *parens patriae*. The defendant growers' petition for writ of certiorari to review that decision, filed in this Court on February 2, 1981, is still pending as No. 80-1305. On February 4, 1981, the U.S. Court of Appeals for the Second Circuit heard argument on the Common-

wealth's appeal in this case. At the Second Circuit's request, the United States Secretary of Labor filed a brief *amicus curiae* setting forth the federal government's view on Puerto Rico's standing as *parens patriae.*[2] The petitioner growers then filed a lengthy response to the Secretary's *amicus* brief with the Second Circuit, as well as a supplemental brief with this Court in No. 80-1305.

briefing, the U.S. Court of Appeals for the Second Circuit unanimously held that the Commonwealth of Puerto Rico may maintain this action as *parens patriae.*

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Second and Fourth Circuits Are in Agreement on the Sole Issue in This Case.

The sole issue in this case is whether the Commonwealth of Puerto Rico may sue as *parens patriae* to remove unlawful barriers erected by the defendant growers to the employment of Puerto Rican agricultural workers which deny the Commonwealth its right to full participation in the federal employment system. Two U.S. Courts of Appeals have thoroughly considered this question and have concluded that the Commonwealth possesses *parens patriae* standing on the basis of the facts alleged in its complaints, facts which remain uncontro-

[2] The Secretary's brief, which concludes that "federal policy considerations do not weigh against granting Puerto Rico standing to sue as *parens patriae,*" is set forth in its entirety in the Appendix to the Commonwealth's Response to the Supplemental Brief of Petitioners in No. 80-1305.

verted on a Rule 12(b) motion to dismiss.[3] Petitioner's attempt to manufacture a "conflict" worthy of this Court's attention out of two district court decisions which have been reversed on appeal and a lone dissenting appellate judge lacks merit.

II. The Decision Below Is in Full Accord With Prior Decisions of This Court.

In order to possess *parens patriae* standing, a state must assert a quasi-sovereign interest "apart from that of particular individuals who may be affected,"[4] "the gravamen of which runs far beyond the claim of damage to individuals,"[5] "independent of and behind the titles of its citizens."[6] The complaint must assert "a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected." *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923).[7]

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[3] Petitioners consistently throughout the course of this litigation have attempted on appeal to argue "facts" completely outside the record, *viz.*, conclusions reached in a report by the U.S. Comptroller General as to the quality of Puerto Rican workers referred to the apple harvest in 1978, cited at pp. 6-7 of the Petition, or an affidavit filed by a U.S. Department of Labor official in another action stating that complaints filed by Puerto Rican workers after the 1978 harvest season could not be substantiated, cited at pp. 7-8 of the Petition. Petitioners' attempts to supplement the record cannot properly be considered by the Court. Most of these untested "facts," even if true, might go to the merits of the case but not to the issue of standing.

[4] Georgia v. Pennsylvania R.Co., 324 U.S. 439, 451 (1945).

[5] *Id.*, at 452.

[6] Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907).

[7] *See also* Commonwealth of Pennsylvania by Shapp v. Kleppe, 533 F.2d 668, 674 (D.C. Cir. 1976) (controversy must in substance implicate state's interest in economic supervision); Kelley v. Carr, 442 F.Supp. 346, 356 (W.D. Mich. 1977) (inherent in concept of quasi-sovereign interest is protection of the public interest).

The Commonwealth's complaint alleges that by refusing to hire Puerto Rican workers, by terminating Puerto Rican workers on various pretexts, and by subjecting Puerto Rican workers to working conditions less favorable than those provided to Jamaican workers, the defendant apple growers have caused and continue to cause irreparable injury to the Commonwealth by frustrating its efforts to participate in the federal employment system as a labor supply state, hindering the Commonwealth Secretary of Labor in the performance of his statutory charge to further the interests and promote the opportunities of Puerto Rican laborers,[8] and depriving the Commonwealth's citizens of rights and benefits guaranteed them by federal law.

The Second Circuit, finding these allegations sufficient to support *parens patriae* standing, honored the accepted rule that on a motion to dismiss under Fed.R.Civ.P 12(b) a court must accept as true all material allegations of the complaint, and must draw therefrom all reasonable inferences in favor of the plaintiff. *Warth* v. *Seldin,* 422 U.S. 490, 501 (1975); *Jenkins* v. *McKeithen,* 395 U.S. 411, 421-422 (1969). The court thus necessarily rejected petitioners' mischaracterization of this action as one in which the Commonwealth is prosecuting as a volunteer simple claims for breach of contract on behalf of individual workers. The court correctly recognized that "a broader range of state interests" is at stake in this litigation:

> The activities of the growers will significantly affect the economy of Puerto Rico. While the impact on the economy of the unemployed status of the workers and the care of their families is the Com-

[8] 3 L.P.R.A. §§ 305, 306 (1965); 29 L.P.R.A. § 529 (1966), as amended July 13, 1978.

> monwealth's concern, the harm is more fundamental and pervasive. Puerto Rico is confronted with an average adult unemployment rate of 18.5%. For many years the Commonwealth government has attempted to alleviate unemployment by placing Puerto Rican workers in jobs on the mainland. In the period of 30 years prior to 1978, 350,000 Puerto Rican workers were placed in agricultural and non-agricultural jobs on the mainland. In 1978, 3,967 workers were actually placed in agricultural jobs outside the apple industry. The figures reflect the importance of migrant labor to the economy of Puerto Rico.
>
> * * * * *
>
> A statewide conspiracy to discriminate against Puerto Ricans by apple growers who except for such discrimination would have employed a significant number of Puerto Rican laborers will adversely affect the continuing effort of the Commonwealth to secure work for its citizens.

Commonwealth of Puerto Rico ex rel. Quiros v. *Bramkamp*, ____ F.2d ____, slip op. at 4244-4243, Appendix to Petition at 24a-25a (2d Cir., July 28, 1981). (Footnote omitted.)

The Fourth Circuit, in the *Snapp* case, also recognized the extent of the harm resulting from apple industry discrimination against Puerto Rican workers:

> Puerto Rico's effort to strengthen its economy and to provide its citizens a way of life comparable to mainland standards must be viewed from a clear perspective. The number of farm workers temporarily employed annually does not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens. . . . Deliberate efforts to stigmatize the labor force as inferior carry a universal sting.
>
> * * * * *

> *Parens patriae* standing is appropriate where a sovereign seeks to protect a vital aspect of the general welfare of a substantial portion of its citizenry from serious, harmful, offensive conduct. It is the magnitude and the pervasiveness of the societal harm that must be weighed — not the directness of the injury to particular individuals.

Commonwealth of Puerto Rico ex rel. Quiros v. *Alfred L. Snapp & Son, Inc.*, 632 F.2d 365, 370 (4th Cir. 1980).

In *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, Georgia was permitted to invoke the original jurisdiction of the Court in a suit to outlaw discriminatory freight rates constituting "an invidious discrimination against a region or locality," 324 U.S. 462, although individual shippers were most directly affected by the overcharges and were capable of prosecuting their own actions for relief. The Court recognized that the citizens of the state suffered substantially, if indirectly, from the alleged discrimination:

> Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.

324 U.S. at 451. The Courts of Appeals for the Second and Fourth Circuits both perceived that the discriminatory barriers against employment of Puerto Rican laborers which the Commonwealth alleges have been erected by the apple industry defendants are analogous, in their crippling effect on the Puerto Rican economy, to the discriminatory rates alleged by Georgia in the *Pennsylvania Railroad* case.

One final factor to consider in determining the propriety of *parens patriae* standing is "the presence or absence of a more appropriate party or parties capable of bringing suit" and achieving "complete relief." *Commonwealth of Pennsylvania by Shapp* v. *Kleppe*, 533 F.2d 668, 675 (D.C. Cir. 1976), *cert. denied* 429 U.S. 977. The Second Circuit correctly observed that the potential or theoretical availability of relief to individual workers, through separate lawsuits or administrative complaint proceedings,[9] cannot prevent the Commonwealth from seeking a comprehensive resolution of its *parens patriae* grievances:

> [T]he interests of the individual laborers who were deprived of employment in 1978 are not co-extensive with those of the public which the Commonwealth represents. Thus, even if the workers could marshal the resources to institute and effectively prosecute actions or a class action in their own behalf, there is no assurance that all named defendants herein would be sued or that relief against widespread and future discrimination would be actively pursued. The vindication of the rights of all future migrant laborers and the public of Puerto Rico should not be made dependent upon the possible relief obtained by the individual workers.

Commonwealth of Puerto Rico ex rel. Quiros v. *Bramkamp*, slip op. at 4246-4247, Appendix to Petition at 26a. (Footnote omitted.)

Both the Second and Fourth Circuits have faithfully applied established priniciples of *parens patriae* standing to find that the Commonwealth possesses such standing in this litigation.

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[9] The Second Circuit did not "ignore" the existence of the U.S. Employment Service Complaint System, as petitioners assert at p. 18 of the Petition. The issue was fully briefed below by petitioners and by the U.S. Secretary of Labor as *amicus curiae*.

III. This Case Is Not One of First Impression.

Petitioners would have the Court review the Second Circuit's decision because "this appears to be the first case to raise the issue [of *parens patriae* standing] in the context of alleged employment discrimination and contractual violations," and would "open up the federal courts to a whole new class of lawsuit." Petition, p. 21. But recognition of harm to the general economy of a state as an injury to the state's quasi-sovereign interests is not new. This is not the first case in which harmful conduct is alleged to be directed toward the citizens of a particular state or region. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439. Where a quasi-sovereign interest is at stake, the right of a state to sue private citizens or a sister state to enforce federal law on behalf of its citizens has been consistently recognized. *See, e.g., Maryland* v. *Louisiana*, ___ U.S. ___, 49 U.S.L.W. 4562 (May 26, 1981); *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; *Pennsylvania* v. *Porter*, ___ F.2d ___ (3d Cir., July, 30, 1981) (*en banc*); *Missouri* v. *NOW*, 467 F.Supp. 289 (W.D. Mo. 1979), *aff'd* 620 F.2d 1301; *Kelley* v. *Carr*, 442 F.Supp. 346 (W.D. Mich. 1977).

Each decision on *parens patriae* standing must hinge on analysis of the facts of the case, whether set forth in the allegations of a complaint, as here, or whether developed during the course of trial. The Second Circuit correctly applied recognized principles of the *parens patriae* doctrine to the particular circumstances of this case.

CONCLUSION

For the reasons set forth above, the Court should deny the requested writ.

Respectfully submitted,

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Petitioner's Reply Brief

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v.

COMMONWEALTH OF PUERTO RICO on the relation of PEDRO BAREZ, SECRETARY, DEPARTMENT OF LABOR AND HUMAN RESOURCES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent's Brief in Opposition filed with the court on September 21, 1981, presents an argument not raised by the respondent Commonwealth of Puerto Rico at any previous stage of this preceeding. Pursuant to Sup. Ct. R.22.5, petitioners Louis Bramkamp, *et al.* submit this reply brief in response to that argument.

ARGUMENT

Respondent's Remarks That the Petitioner Apple Growers Engaged in "Concerted" Resistence to the Employment of Puerto Rican Workers Insinuate the Issue of Conspiracy into This Case for the First Time and Have No Basis in the Record.

Respondent states that the question presented by this case is whether ". . . the Commonwealth of Puerto Rico [may] sue as *parens patriae* for declaratory and injunctive relief against the violation by New York apple growers of a pervasive federal statutory and regulatory scheme . . . where: . . . (3) *the petitioners have engaged in coordinated, industry-wide resistance to the employment of Puerto Rican workers in apple picking jobs. . . .*" Respondent's Brief in Opposition, at i. (Emphasis added.) Later, the Commonwealth states that "[i]n 1975 and each succeeding year, the apple industry has engaged in *concerted* resistance to Puerto Rican workers. . . ." Respondent's Brief in Opposition, at 3. (Emphasis added.) The Commonwealth later states that "[t]he Commonwealth, confronted again with widespread and *concerted* resistance to the employment of its citizens, filed the instant action for declaratory and injunctive relief. . . ." *Id.* at 6. (Emphasis added.) Finally, the Commonwealth quotes approvingly the Second Circuit's reference to "[a] statewide conspiracy to discriminate against Puerto Ricans by apple growers. . . . *Id.* at 10, quoting *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp,* —— F.2d ——, slip op. at 4245 (2d Cir., July 28, 1981).

The clear import of the Commonwealth's statements is that the petitioner apple growers engaged in a conspiracy to violate the rights of Puerto Rican workers,[1] an

[1] Although the Commonwealth does not use the word "conspiracy" in its brief (except when quoting the Second Circuit), its use of the words "concerted" and "coordinated" clearly suggests a

allegation which the Commonwealth has not made previously either in its complaint or in its briefs filed with the district court and the Second Circuit. Nowhere in the First Amended Complaint of respondent Commonwealth of Puerto Rico can be found the words "concerted" or the word "coordinated" or any other allegation that would even suggest a conspiracy by the defendant apple growers. In its Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss submitted to the district court, the respondent Commonwealth again made no allegation of a conspiracy. The closest the Commonwealth came to even hinting at such a conspiracy was its statements that "[p]laintiff complains of widespread violation by defendants of federal statutes and regulations . . ." and "[i]t is the position of plaintiff that the emergent facts will depict a pattern of conduct by defendants as respects employment of Puerto Rican agricultural workers." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, at 1, 7. In the brief which it filed with the Second Circuit, the Commonwealth stated that it was "[c]onfronted again with widespread resistance to the employment of Puerto Rican workers in the 1978 apple harvest and an apparent industry-

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conspiracy. Black's Law Dictionary (4th Ed. 1951) defines "concerted action" as "action that has been planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme." This Court has stated that "[t]he accepted definition of a conspiracy is, a combination of two or more persons *by concerted action* to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." *Duplex Co. v. Deering*, 254 U.S. 443, 465 (1921). (Emphasis added.). *See also Eastern States Lumber Assn. v. U.S.*, 234 U.S. 600, 614 (1914); *U.S. v. Reading Co.*, 226 U.S. 324, 357 (1912); *Pettibone v. U.S.*, 148 U.S. 197, 203 (1893).

wide pattern of conduct. . . ." Brief for Appellant, at 10.[2]

The respondent's insinuations that the defendant apple growers conspired to deny employment to Puerto Rican workers represent the first time the respondent has raised the issue of conspiracy in this case. The sudden, last minute introduction of such an argument into these proceedings appears to be an attempt by respondent to bolster the erroneous and unsupportable remark of the Second Circuit concerning "a statewide conspiracy to discriminate against Puerto Ricans by apple growers. . . ." *Commonwealth of Puerto Rico ex. rel. Quiros v. Bramkamp, supra*, slip op. at 4245.

CONCLUSION

The Court should ignore the respondent's last minute argument concerning a conspiracy by the petitioner apple growers and issue a writ of certiorari to review the decision of the court of appeals.

Respectfully submitted,

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October 2, 1981

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[2] Even the phrase "pattern of conduct" appears nowhere in the respondent's complaint. What the respondent intended by the use of that ambiguous phrase is not clear, but the import of words such as "concerted" and "coordinated" differs significantly from that of "pattern of conduct."